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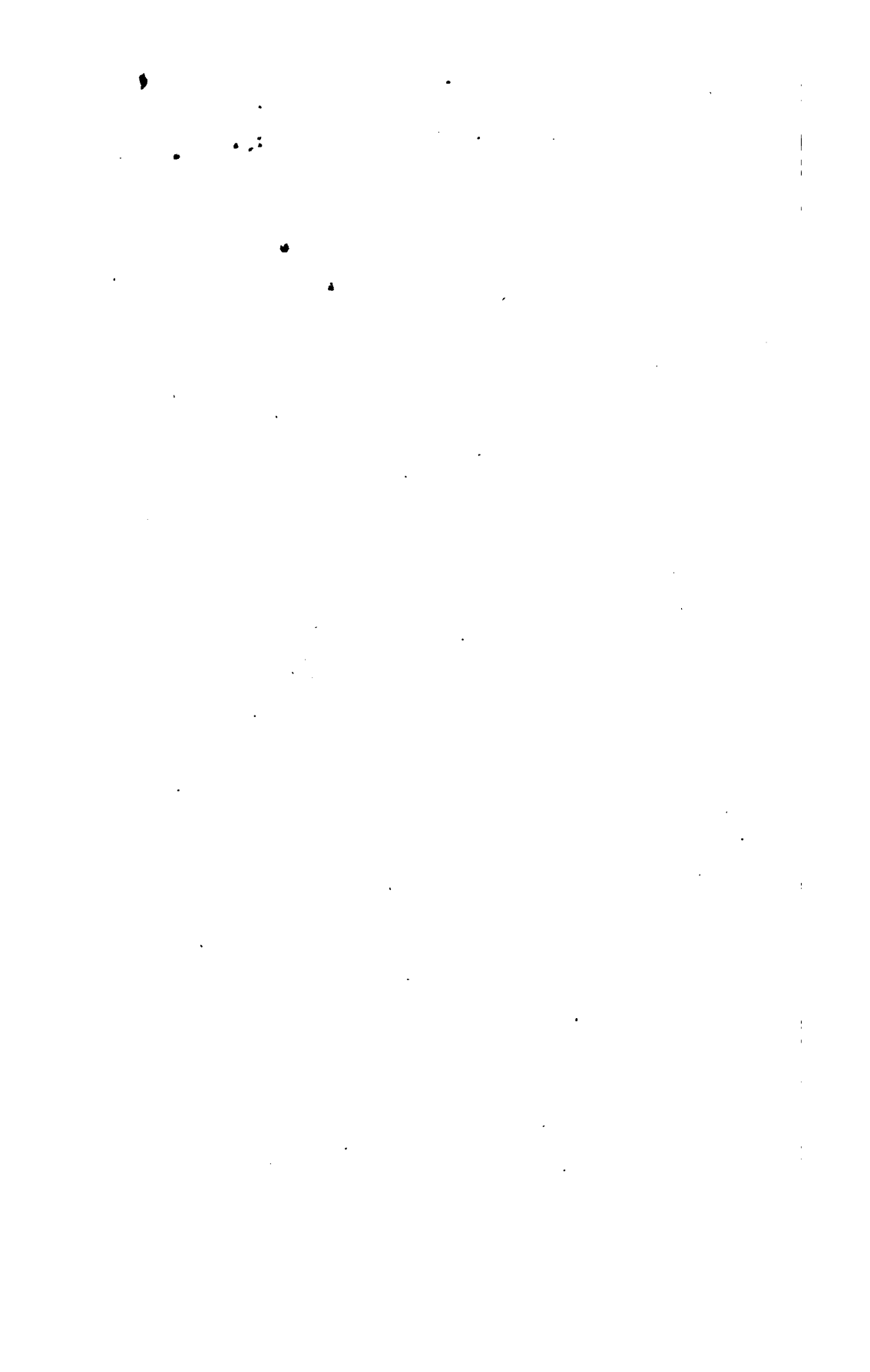
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**TREATISE**

ON

**CRIMINAL PLEADING,**

WITH

**PRECEDENTS OF INDICTMENTS,**

**SPECIAL PLEAS, &c.**

**Adapted to Practice.**

By **THOMAS STARKIE, Esq.**  
OF LINCOLN'S INN, BARRISTER AT LAW.

**VOL I.**

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**"Allegari non debuit quod probatum non relevat."**

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**1814.**

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Davidson,  
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TO THE  
RIGHT HONOURABLE  
SIR VICARY GIBBS,

*LORD CHIEF JUSTICE OF HIS MAJESTY'S COURT  
OF COMMON PLEAS, &c. &c.*

*This Treatise*

IS VERY RESPECTFULLY DEDICATED,

BY

HIS MOST OBEDIENT AND HUMBLE SERVANT,

THOMAS STARKIE.



# TABLE OF CONTENTS

TO

## VOL. I.

---

	Page.
<i>Introduction</i> . . . . .	xi

### CHAPTER I.

#### *How far the Indictment should shew the Offence to be within the Jurisdiction of the Indictors,*

1. <i>Of the Locality of Crimes at Common Law</i> . . .	1
2. <i>Statutable Exceptions, and general Rules as to Indictments found upon them</i> . . . . .	6
3. <i>In what County the Indictment should be laid in particular Cases at Common Law</i> . . . . .	19
4. <i>Of noticing the Jurisdiction, when it depends upon some other particular circumstances</i> . . . . .	26

### CHAPTER II.

#### *Of the Joinder of Parties and Offences,*

1. <i>Joinder of Defendants</i> . . . . .	29
2. <i>Of Offences</i> . . . . .	36
3. <i>Of Defendants and Offences</i> . . . . .	40

## CHAPTER III.

*Of the Description of the Defendant,*

Page.

- |  |           |    |
|--|-----------|----|
| 1. <i>At Common Law</i>                  | . . . . . | 42 |
| 2. <i>Under the Statute of Additions</i> | . . . . . | 44 |

## CHAPTER IV.

*Of the general Averments of Time and Place,*

- |                             |           |    |
|-----------------------------|-----------|----|
| 1. <i>Averment of Time</i>  | . . . . . | 50 |
| 2. <i>Averment of Place</i> | . . . . . | 57 |

## CHAPTER V.

*Of the substantial Description of the Offence  
in the Body of the Indictment*

63

## CHAPTER VI.

*Of alleging the Nature and Degree of the Offence  
in technical Terms,*

- |  |           |    |
|--|-----------|----|
| 1. <i>As against the Principal in the first Degree</i> | . . . . . | 69 |
| 2. <i>Against Principals in the second Degree</i>      | . . . . . | 75 |

## CHAPTER VII.

*Of setting forth the Means and Manner of  
committing the Offence, with the Circum-  
stances immediately connected therewith*

83

- |                                     |           |    |
|-------------------------------------|-----------|----|
| 1. <i>Forcible Means, &amp;c.</i>   | . . . . . | 83 |
| 2. <i>Fraudulent Means, &amp;c.</i> | . . . . . | 88 |

## TABLE OF CONTENTS.

vii

	Page.
3. <i>Illegal Solicitations, Attempts, and Endeavours</i>	113
4. <i>Misconduct in Office, Extortions, &amp;c.</i> . . .	139
5. <i>Illegal Combinations and Conspiracies</i> . . .	144

## CHAPTER VIII.

<i>Of the Averment of Circumstances collateral to the Act or Omission, which render that Act or Omission criminal</i> . . . .	149
1. <i>Situation or Character of the Defendant</i> . . . .	150
2. <i>Situation of others</i> . . . .	155
3. <i>Other Circumstances collateral to the principal Act, negative Averments, &amp;c.</i> . . . .	159

## CHAPTER IX.

<i>Of averring the Defendant's Intention</i> . . . .	165
--	-----

## CHAPTER X.

<i>Of the Description of Persons, Places, and Things, connected with the Offence, with Names, Quantity, and Value</i> . . . .	170
1. <i>Certainty of Persons</i> . . . .	170
2. <i>Of Places</i> . . . .	176
3. <i>Of Things moveable</i> . . . .	180

## CHAPTER XI.

<i>Conclusion of the Indictment</i> . . . .	195
---	-----



## CHAPTER XII.

	Page.
<i>Indictment founded upon Statutes</i> . . .	199
1. <i>Recital of the Statute, and Effect of a Variance</i>	200
2. <i>Description of the Offence—1st. in Reference to the Circumstances mentioned in the Purview, and 2ndly. in Reference to the Language of the Statute</i> . . . . .	206
3. <i>Conclusion against the Form of the Statute</i> . .	211
	215

## CHAPTER XIII.

<i>Caption of Indictment</i> . . . . .	220
--	-----

## CHAPTER XIV.

*Defective Indictment,*

1. <i>Language of Indictments</i> . . . . .	229
2. <i>Indirect, uncertain, double, and indefinite Allegations</i> . . . . .	231
3. <i>Repugnancy—Doctrine of Surplusage—Use of a Videlicet</i> . . . . .	234
4. <i>Variance</i> . . . . .	241

## CHAPTER XV.

<i>Of Amendments</i> . . . . .	244
--------------------------------	-----

## CHAPTER XVI.

*Of Process upon Indictments and Informations,*

1. <i>In Case of Treason or Felony</i> . . . . .	257
--	-----

## TABLE OF CONTENTS.

ix  
Page.

1. <i>Of the Capias, and in what Cases more than one is requisite</i> . . .	257
2. <i>Of the Exigent and Outlawry</i> . . .	267
3. <i>Writ of Proclamations</i> . . .	270
2. <i>In Case of Misdemeanors below the Degree of Felony</i> . . .	272
3. <i>In Case of Informations</i> . . .	275
4. <i>Defects in Process</i> . . .	276

## CHAPTER XVII.

### *Motion to quash the Indictment,*

1. <i>At the Instance of the Prosecutor</i> . . .	282
2. <i>Of the Defendant</i> . . .	283

## CHAPTER XVIII.

<i>Arraignment</i> . . . . .	287
------------------------------	-----

## CHAPTER XIX.

### *Plea,*

1. <i>To the Jurisdiction</i> . . .	292
2. <i>Declinatory Pleas</i> . . .	293
3. <i>Plea in Abatement</i> . . .	293
1. <i>Defects apparent on the Record</i> . . .	293
2. <i>Such as arise from Facts dehors the Record</i> . . .	294
4. <i>Demurrer</i> . . .	297
5. <i>Plea in Bar,</i> . . .	298
<i>Auter-foits acquit</i> . . .	298
<i>Auter-foits convict</i> . . .	311
<i>Auter-foits attain</i> . . .	313
<i>Pardon</i> . . .	315
<i>To Indictment for Misdemeanor</i> . . .	317
6. <i>Not guilty</i> . . .	320

**CHAPTER XX.**

	<b>Page.</b>
<i>Of the Verdict</i> . . . . .	323
1. <i>General Verdict</i> . . . . .	324
2. <i>Partial Acquittal</i> . . . . .	328
3. <i>Special Verdict finding the Facts</i> . . . . .	333

**CHAPTER XXI.**

<i>Of Judgment</i> . . . . .	341
------------------------------	-----

**CHAPTER XXII.**

*Of avoiding the Judgment, Writ of Error, &c.*

1. <i>By Plea</i> . . . . .	348
2. <i>By Writ of Error</i> . . . . .	352

## INTRODUCTION.

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**T**HE legal definition of an offence being proposed, as well as the circumstances of a particular case falling within that definition, how is the charge to be described against the offender on the face of the record? With what certainty of legal terms and language? with what enumeration and detail of circumstances? To answer this important question with as much brevity as consists with clearness, under the sanction of the most venerable authorities, collected and arranged, is the principal object of this treatise.

I propose, therefore, in the first place, briefly to enumerate the different modes of criminal accusation recognized by the courts, and shall then proceed to consider their several requisites with some minuteness, and also to notice such other parts of the record as are connected with the main design.

1. A written accusation presented to the grand jury, (sworn to inquire for the body of the county,) at the suit of the king, is termed a bill of indict-

ment, and when found by them, on oath, to be true, is called an *indictment* (b).

A grand jury may find a bill to be true as to one or more charges contained in distinct counts, and find that it is not a true bill, or return it "not found," as to the rest (c); but they cannot divide an entire count, so as to find it true as to part only; and if they do, the whole of the finding is void, and a new bill should be presented (d). A bill cannot be found, unless twelve at the least of the grand jury agree to find it; for no man can be convicted, at the suit of the king, of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours, that is by twelve at the least of the grand jury in the first place, and afterwards by the whole of the petit jury, twelve more, finding him guilty upon the trial.

The indictment having been so found is publicly delivered in court.

An *indictment*, in a larger sense, is frequently used to denote an accusation or declaration, at the suit of the king, for some offence found by a proper jury of twelve men, at the suit of the king (f); and, in this sense, a presentment by a grand jury, when reduced to proper form, is termed an indictment, though no bill has been preferred (g).

(b) 2 Hale, 153. 2 Haw. c. 25. s. 1. (d) 2 Haw. c. 25. s. 2. Yel. 99.

(c) Cowp. 325.

(f) Co. Litt. 126. b.

(g) 2 Ins. 739.

2. A *presentment* is the notice taken by the grand jury of any offence, from their own knowledge (*h*) and observation, without any indictment laid before them at the suit of the king. Upon such presentment, the officer of the court must frame an indictment before the party can be put to answer it (*i*); in a larger sense, a presentment comprehends all inquisitions of office and indictments found by a grand jury (*k*).

3. When the accusation is found by a jury specially returned to inquire concerning that particular offence, it is termed an *inquisition*; as where a person is found guilty of the death of another upon an inquisition before the coroner on his view (*l*).

4. A defendant may be arraigned upon a *verdict*; as where, in an action of trespass, the jury find that the defendant stole the goods, or in an action for words imputing felony, where the defendant justifies that the words are true, and the jury find their verdict for the defendant. In such cases it is said, the party is liable to be put to answer, as on an indictment, without any further accusation, the charge having been found by a jury of twelve men. But, according to Serj. Hawkins, unless the court, in which such a verdict is returned, has jurisdiction

(*h*) Lamb. 1. 4. c. 5. 4 Bl.  
Comm. 301.

(*i*) 2 Ins. 793.

(*k*) 2 Haw. c. 25. s. 1.

(*l*) 2 Haw. c. 25. s. 6.

over the crime itself, such a verdict seems to be of little force (*m*).

5. An appeal is an accusation, by one private subject against another, of some crime (*n*); and in some instances, where the private appellant does not or cannot proceed, the defendant may be arraigned upon the appeal at the suit of the king (*o*).

6. An *information* is a declaration of an offence or charge against any one at the suit of the king (*p*): these are of two kinds,

1st. Those which are prosecuted at the suit of the king, and which are filed by his own immediate officer the attorney-general; and, 2dly, those which are prosecuted in the name of the king at the relation of some private person, or common informer, and these are filed by the king's coroner and attorney in the court of King's Bench.

Various as these modes of accusation are in their origin, in their requisites, whether formal or substantial, they closely resemble each other (*q*); in appeals, indeed, greater nicety was frequently exacted than in indictments, but the proceeding by

(*m*) 2 Haw. c. 25. s. 6. R. v. Jolliffe, 4 T. R. 493. be obsolete, no further notice will be taken of them in the

(*n*) 1 Ins. 123. 287. Staundf. 58. subsequent pages, except as the decisions founded upon them

(*o*) For the learning on this subject, see 2 Haw. c. 25. s. 7, 8, &c. Since the practice of serve to illustrate the main subject.

(*p*) Termes de la Ley.

(*q*) 2 Haw. c. 25. s. 9.

appeal has so long fallen into disuse, that its form and qualities will not be noticed, except incidentally, when they may tend to illustrate the main subject of the work. In describing the different requisites of an indictment, presentment, inquisition, or information, in order to avoid repetition, the term indictment only will be used, the same rules being in general applicable to all.

The form and requisites of an indictment, and the process, pleas, &c. will be considered in the following order :

1. The formal requisites of an indictment, including the county (*r*) in which the offence is to be laid—the joinder of parties (*s*)—of offences—the description of the defendant (*t*)—the general averments of time and place (*u*).

2. The substantial description of the offence itself (*x*) in the body of the indictment.

3. The conclusion of the indictment (*y*).

4. Indictments upon statutes (*z*).

5. The caption of an indictment (*a*).

6. The several kinds of defects in indictments (*b*), and the doctrine of amendment (*c*).

(*r*) Chap. 1.

(*s*) Chap. 2.

(*t*) Chap. 3.

(*u*) Chap. 4.

(*x*) Chap. 5. to 10. inclusive.

(*y*) Chap. 11.

(*z*) Chap. 12.

(*a*) Chap. 13.

(*b*) Chap. 14.

(*c*) Chap. 15.



7. Process (*d*), motion to quash (*e*), arraignment (*f*), pleas (*g*), verdict (*h*), judgment (*i*), writs of error (*k*).

To these is added a collection of Precedents, illustrated with a few notes. I have examined these forms with attention, and have intimated my doubts concerning them whenever they occurred.

(*d*) Chap. 16.

(*e*) Chap. 17.

(*f*) Chap. 18.

(*g*) Chap. 19.

(*h*) Chap. 20.

(*i*) Chap. 21.

(*k*) Chap. 22.

# INDICTMENT.

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## CHAP. I.

*How far the Indictment should shew the Offence to be within the Jurisdiction of the Indictors.*

- I. *Of the Locality of Crimes at Common Law, p. 1 to 6.*
- II. *Statutable Exceptions, and general Rules as to Indictments founded upon them, p. 6 to 19.*
- III. *In what County the Indictment should be laid in particular Cases at Common Law, p. 19 to 26.*
- IV. *Of noticing the Jurisdiction, when it depends upon some other particular Circumstances, p. 26.*

THE power of jurors and others to inquire concerning offences, is usually circumscribed (*a*) and local; it is therefore essential to the validity of an indictment, to shew that the offence (*b*) was committed within the jurisdiction of those by whom the inquiry was made. And as an indictment will be vicious which does not shew this, *a fortiori* it will be defective, if it allege that the offence was committed in some place beyond the jurisdiction of the indictors.

By the simple rule of common law, the attention of jurors was confined with great strictness to the county or division for which they were returned;—a circumstance productive of so much inconvenience, that it was found necessary to introduce those statutable exceptions to the rule which will presently be noticed.

(*a*) 3 Ins. 49. Summ. 203. Eliz. 237. Dyer, 69. 2 Keb.

(*b*) 1 Buls. 203. 205. Cro. 302. Cro. J. 276. Keilw. 89.

Lord Hale says, "The grand (c) jury are sworn to inquire *pro corpore comitatûs*, and therefore cannot regularly inquire of a fact done out of that county for which they are sworn, unless specially enabled by act of parliament, except in some particular cases." Too strict an adherence to this doctrine produced an enormous failure of justice: it frequently happened that an offence begun in one county was consummated in another, the consequence was, that the offender escaped with impunity, since he could not be indicted by a jury of either.

In Danby's (d) case, under the statute 8 H. 6. c. 12. against stealing records, &c. it was holden, that if the offence were to be committed partly in one county and partly in another, the offender could not be punished in either. But Lord Hale says, he might in such case be punished for the misprision of the felony in either county (e).

So under the (f) stat. 3 H. 7. c. 2., against the forcible abduction of an heiress, and afterwards marrying her, &c. it was holden, that if the forcible abduction were confined to one county, and the marriage took place in a second, the offender could not be tried in either.

But if in such case the forcible abduction had been continued into the county where the marriage took place, the offence would have been complete in that county, and the offender might have been tried there (g).

(c) 2 Hale, 163. Bell's ciny in B. at common law, Case, 9 Car. B. R. though not of the robbery;

(d) Hale, 651, 2. for it is theft wherever he carries the goods. 7 Co. Bulwer's Case, 2 Hale, 163. Br.

(e) Ib. Ind. pl. 26. Br. Cor. pl. 171.

(f) Fulwood's Case, Cro. Car. 488. Hob. 183. Hence an acquittal of the robbery in the county A., and carry the goods into the county B., he is indictable of the lar-

ciny in any one county ought to serve him for plea in any other. Br. Cor. 140. 4 H. 7. 5.

In these instances the several acts, constituting the offence, were personally committed by the offenders in different counties: but the mischief resulting from the general rule was far more extensive; for it seems to have been held, that no collateral circumstance could be inquired of, if it happened in a second county, though the facts in which the offender was personally concerned, were confined wholly to the first; so that (*h*) if A. inflicted a mortal wound on B. in one county, of which B. died in the adjoining one, A. could be indicted in neither; for a jury of the first could not take notice of the death in the second, and a jury of the second could not inquire of the wounding in the first (*i*).

But it has been held, that if Hale, 163. 6 H. 7. 10. 10 H. 7. 28. 10 H. 7. 20. Fitz. Ind. 23.

the offence cannot be inquired of at common law, though the goods be afterwards carried by the offender into a county. 3 Ins. 113. 13 Co. 53. And to remedy this supposed defect, an act was passed to authorize such trials in certain cases. Vide *infra*, f. 10. Yet where goods stolen in Scotland or at sea, are brought into the body of a county, the case seems to embrace every ingredient of larceny; the property in the goods remains unaltered, and there is a caption and asportation, *animo furandi*, within the county.

(*h*) See *pr.* to stat. 2 & 3 E. 6. c. 24. Staun. 89. 2

(*i*) Though it appears from the preamble to the st. 2 & 3 E. 6. c. 24., that such was the law at that time with respect to indictments of homicide, yet it was otherwise with respect to appeals of death, which, when the blow was struck in one county and the party died in another, used to be tried by a jury from both counties. 4 H. 7. 18. Br. Cor. pl. 141. 1 Haw. c. 31. s. 13. 2 Haw. c. 23. s. 35. 2 Ins. 49. But when the counties could not join, the appeal failed. 2 Ins. 49.

But it was held, that an indictment must be taken in one county only. 4 H. 7. 18.

And the difficulty was fre-

And the same nicety applied to the case of all accessories in one county to a felony committed in another, who, on account of the same difficulty, escaped unpunished (k).

quently avoided by carrying the dead body back into the county where the blow was struck, and there a jury might inquire both of the stroke and of the death. 6 H. 7. f. 10. 1 Haw. c. 31. s. 13. 7 H. 7. f. 8. And even without such removal it seems to have been doubted, whether a jury of the county, where the stroke was given, might not inquire of the felony. See 7 H. 7. 8. where Tremaine and Hussey, justices, were of opinion, that an indictment, which laid the blow in Middlesex and the death in Essex, was good, because the striking is the principal act, and they who can take notice of the principal, may take notice of the death, as an accessory, though in another county; but Fairfax J. differed from them, and Sir Robert Brooke, in his abridgment of this case, agrees with Fairfax. Br. Ind. 31.; and see 2 Haw. c. 25. s. 36.

And at common law the coroner, *super visum corporis*, might inquire of all accessories or procurers before the fact, though the procurement were in another county. 1 Hal. 427. 43 E. 3. f. 17.

(k) Staunf. b. 1. c. 46. 2 & 3 E. 6. c. 24. 1 Hale, 623. A man was indicted in Middlesex, for that he in the county of Middlesex procured J. S. to kill T. B.; by means of which, the said J. S. did kill T. B. in the county of Berks; and the defendant appears to have been discharged, not because such an indictment would not lie, but because the justices and coroner of the county of Berks certified, that the principal had not been indicted before them of the said felony. 9 E. 4. 48. Staunford, b. 1. c. 46. lays it down generally, that if A., committing a felony in one county, be received before attainted by B. in another, it is not felony in B., because those of the county where he offended, cannot notice the felony in the other county: and he cites the above case, 9 E. 4. 48., which does not warrant his position, and also 43 E. 3. f. 17., which was an appeal by a widow against two in the county of Kent, for receiving a third in the county of Dorset, who had killed her husband in Kent; and assuming those defendants to have been discharged,

The failure of justice, which resulted from this doctrine, is fully declared in the preamble to the st. 2 & 3 E. 6. c. 24., which provided a remedy for these defects against principals in case of homicide, and also against accessories to felonies in general.

The preamble recites, that “whereas it often happeneth and cometh in ure in sundry counties of this realm, that a man is feloniously stricken in one county, and after dieth in another county, in which case it hath not been founden by the laws or customs of this realm, that any sufficient indictment thereof can be taken in any of the said two counties; for that, by the custom of this realm, the jurors of the county where such party died of such stroke, can take no knowledge of such stroke, being in a foreign county, although the same two counties and places adjoin very near together. Ne the jurors of the county, where the stroke was given, cannot take knowledge of the death in another county, although such death most apparently came of the same stroke. So that the king’s majesty within his owne realm cannot, (*l*) by any laws yet made or known, punish such murtherers or manquellers for offences in this form committed and done; nor any appeal(*m*) at some time may lie for the same, but doth also fail, and the said murtherers and manquellers escape thereof without punishment, as well in cases where the counties where such offences be committed and done may join, as otherwise where they may not which, from the whole of the principal felony and the receipt took place, in the *same* case, f. 17. and f. 34. appears doubtful, it seems clear, that *vill*, though in *different counties*, an appeal lay. And it seems the coroner might notice accessories in another county. See f. 4. note, (*i*).

they were not discharged generally, on the ground that an appeal for receiving in one county the principal after the felony in a second, was not maintainable; for it was expressly held, that where the

(*l*) But see p. 12.  
(*m*) See p. 3. note (*i*).

join. And also it is a common practice amongst errant thieves and robbers in this realm, that after they have robbed or stolen in one county, they will convey their spoil, or part thereof, so robbed or stolen, unto some of their adherents into some other county, where the principal offence was not committed or done, who, knowing of such felony, willingly and by false covin receiveth the same (n); in which case, although the principal felon be attainted in one county, the accessory escapeth by reason that he was accessory in another county, and that the jurors of the said other county, by any law yet made, can take no knowledge of the principal felony ne attainder in the first county, and so such accessories escape thereof unpunished, and do often put in ure the same, knowing that they may escape without punishment."

The statute then proceeds to enact,

1st. That where a person feloniously stricken or poisoned in one county, shall die of the same in another, an indictment thereof, found by jurors of the county where the *death shall happen*, whether before the coroner, upon sight of the body, or before the justices of the peace, or other justices or commissioners having authority to inquire, shall be as good and effectual as if the stroke or poisoning had been committed in that county.

2. That the justices of gaol delivery and oyer and terminer (o), in the county where such indictment shall be taken, and the justices of the King's Bench, after such indictment removed before them, shall proceed thereon, in all points, as if such felonious stroke, or poisoning and death, had grown in the same county.

(n) Hence it should seem, holden, both before and after that the receiver of stolen the statute. See Fitz. Cor. 126. goods, knowing them to have 208. Staunf. b. 1. f. 44. and been stolen, was then considered to be an accessory; yet 5 Ann, c. 31. certainly the contrary has been (o) The court of K. B. is within these words. 9 Co. 118.

3. That in such case *an appeal* may be sued in the county where the party died, both against principals and accessories, in whatsoever county the accessories shall be guilty; and that the justices shall proceed against such accessories, in the county where such appeal shall be so taken, in like manner and form as if their offences had been committed and done in the same county (*o*), as well concerning the trial by jurors upon plea of not guilty as otherwise.

4. That where any murder or *felony* shall be committed in one (*p*) county, and one person or more shall be *accessory or accessories*, in any manner of wise to any such murder or felony, in any other county, then an indictment found or taken before such justices of the peace, &c. to inquire of felonies in the county (*q*) where such offence of accessory or accessories, shall be committed or done, shall be as good and effectual as if the principal offence had been committed or done within the same county, where the same indictment against such accessory shall be found.

The statute then proceeds to direct, that upon suit to the justices, &c. or two of them, in such county where such offence of accessory shall be committed, they shall

(*o*) And therefore in case of the inquiry in the third county an appeal, it is not necessary good as against the principal, to procure a jury from both but not as against accessories. counties. See f. 3. n. 1.

(*p*) A. in one county directs the same statute should direct, that B. to murder C., B. strikes C, accessories to a murder, if prosecuted by appeal, should be in a second county, and C. dies tried in the county where the party died, but if by indictment, in the county where they in a third,—qu. whether A. is within the act? for the offence of murder is not complete in were accessories. any one county, and the former part of the statute makes



write (r) to the *custos rotulorum*, or keepers of the records, to certify whether the principal is attainted, convicted, or otherwise discharged; and after the receipt of such certificate, shall proceed against every such accessory in such county where he became accessory, and in such manner and form as if both the principal offence and that of the accessory had been committed in that county.

In an indictment against an accessory under this statute, for procuring the commission of a murder in another county, it should be averred according to the fact, that the principal committed the murder in the true county (s). And upon the same ground the blow should be averred to have been struck in the first county, though the party be indicted in the second, where the death happened.

As an offence, begun in one county and completed in another, could not be tried in either, *a fortiori* the objection applied where part of the offence was committed out of the realm. So that if a blow were given on the high seas, of which the party died in England, this was held to be *casus omissus*, which could be tried neither by the admiral, nor by a jury of the county (t). But by the stat. 2 G. 2. c. 21., where any person, feloniously stricken or poisoned at any place out of England, shall die of the same in England, or being feloniously stricken or poisoned

(r) The writing should be Co. 114. 2 Haw. c. 29. s. 51.  
by writ in the king's name, under 3 Ins. 49.  
the teste of the justice so (t) 3 Ins. 48. 2 Hale,  
sending it. Dy. 254. b. 1 163. But it seems the death  
Hale, 623. The same form of formerly might have been  
proceeding appears to have inquired of by the court of  
been adopted before this statute was made. See f. 4. note k. K. B., sitting in the county  
where it happened. 2 Hale, 12.

(s) Lord Sanchar's case, 9 15.; so it may under 33 H. 8.  
c. 23. See p. 12.

in England, shall die of such stroke or poisoning out of England, an indictment thereof, found by the jurors of the county in which either the death or the cause of death shall respectively happen, shall be as good and effectual in law, as well against principals as accessories, as if the offence had been completed in the county where such indictment shall be found.

A person on shore shot at and killed another upon the sea, at the distance of 100 yards from the shore: and it was holden that the case was not within this statute, but that the felony was triable by the admiral (u).

In general where a statute makes a new felony of an offence, consisting partly of an act within the kingdom and partly of one without, and limits it to be tried *where the offence is committed*, it shall be tried where that part of the offence is committed that is within the kingdom. So that an offender against stat. 1 J. c. 2., by passing the sea and serving a foreign prince, without taking the oath of obedience, was held to be triable in that county whence he passed upon the sea (x).

Before those statutes are noticed, which authorize an inquiry in a county wholly unconnected with the offence, it may be proper to notice others, which give the courts cognizance of an offender who brings goods into a county feloniously stolen elsewhere.

By the stat. 3 W. & M. c. 9. s. 3., if any person or persons be indicted of felony for stealing any goods in any county of England, Wales, or town of Berwick-upon-Tweed, and be convicted or attainted, or stand mute, or will not directly answer, &c. or challenge peremptorily above 20, &c. he or they shall be excluded from the benefit of clergy, if it appear, upon evidence before the jus-

(u) Coombe's Case, Leach, (x) 1 Hale, 706. 3 Ins. 80, 432.

tices, that the said goods, &c. were taken by robbery or burglary, or in any other manner, in any other county, whereof if such person or persons had been convicted by a jury of the said other county, he or they are excluded from clergy (*y*).

But neither this act, nor the stat. 25 H. 8. c. 3., extends to larcinies ousted of clergy by subsequent statutes (*z*), or to appeals or accessories. Under this statute, it is not necessary that the indictment should aver, that the offence in the foreign county was not clergyable; but it is usual to make an entry to that effect, and to write in the margin of the indictment that it is for a burglary or robbery in another county (*a*). Also the value of the goods should appear to be more than 12*d.*; for otherwise it would be unnecessary for the prisoner to pray his clergy, and therefore the exclusion from it could not hurt him (*b*).

Next, the stat. 13 G. 3. c. 31. s. 4., after reciting that doubts had been entertained upon the subject, enacts, that if any person, having feloniously taken goods in either part of the united kingdom, (i. e. Scotland or England,) shall afterwards have the same in his possession in the other part of the united kingdom, it shall be lawful to indict, try, and punish such person for theft or larciny, in that part of the united kingdom where he shall have the same in his possession, as if the same had been originally stolen in that part of the united kingdom.

Those statutes will in the next place be briefly mentioned, which authorize an inquiry in a county wholly unconnected with the offence.

(*y*) See also 25 H. 8. c. 3. is taken with the goods within a liberty or corporation. and 5 & 6 E. 6. c. 10.

(*z*) East. P. C. 775. 1 Hale, (a) 1 Hale, 518. 2 Haw. 519. 11 Co. 31. And qu. c. 33. s. 82. And. 114. whether to cases where a thief (b) East, P. C. 775. 1 Hale, 536. 2 Hale, 349: 351.

1. In the county where the offender was *apprehended*.
2. In a *county adjacent* to that in which the offence was committed.
3. In *any county* generally.

And next some statutes will be noticed, which particularly relate to offences,

4. Committed in *Wales*.
5. *On the high seas*.
6. *Beyond the realm*.

1. By the st. 1. J. 1.(c) s. 1. "An offender shall receive such and the like proceeding, trial, and execution, in such county where he shall be apprehended, as if the offence had been committed in the same county where such person shall be taken or apprehended."

This clause has been construed to mean the county where the party is imprisoned (*d*).

By st. 53 G. 3. c. 108. all criminal offences against any acts for granting or securing duties under the management of commissioners of stamps, may be tried, inquired of, and determined, either in the county or city, or town and county, where the offence shall be committed, or where the party or parties accused, or any of them, shall be apprehended.

And under the former of these statutes the party may be indicted where the second marriage was, though he be never apprehended, and so may be outlawed (*e*).

In general, where a statute creating a new felony directs that the offender may be tried in the county in which he is apprehended, but contains no negative words, he may be tried in that county in which the offence was committed (*f*).

2. In a *county adjacent* to that in which the offence was committed. By the stat. 26 G. 2. c. 19. against

(c) Against bigamy.

(d) Hutton, 131.

(e) 1 Hale, 694.

(f) Hale, 694. 3 Ins. 87.

By stat. (o) 26 H. 8. c. 6. counterfeiting of coin, washing, clipping, or minishing of the same, felonies, murders, wilful burnings of houses, manslaughters, robberies, burglaries, rapes, and accessories of the same, or other offences, done in Wales (p) within any lordship marcher, may be inquired of, heard, and determined before the justices of gaol delivery, and of the peace, and every of them in the next adjacent English county, where the king's writ runneth, in like manner as if the same had been committed in the said county. And this act was confirmed by the stat. 34 & 35 H. 8. c. 26. which gives the justices of the grand sessions, power to hold all manner

cases where the death happens in England from a cause feloniously given out of England, or *vice versa*, does not apply to the case of a party dying in Wales in consequence of a blow inflicted in England. See also 1 Hale, 158. 2 Roll. 28. For the same reason Wales is not within stat. 35 H. 8. c. 2. for the trial of foreign treasons.

(o) Before this stat. no treason, murder, or felony committed in Wales, was inquirable before justices or commissioners in England; but only before justices or commissioners assigned by the king, in those counties of Wales where the fact was committed. 1 Hale, 156.

(p) Supposing the stroke to be given in England, and the party to die in Wales, qu. whether the offender can be tried

under this act, aided by 2 & 3 E. 6. c. 24. Mr. East, in his P. C. 365, inclines to think that the trial might be in England. But there appears to be this difficulty to contend with, viz. this construction might draw the trial from the county in which the death took place, to that in which the blow was struck; the very reverse of which was intended by the framers of the 2 & 3 E. 6. If indeed that stat. had enacted, that the offence, to *all intents and purposes*, should be considered as committed in the county where the death took place, the point would have been more dubious; but it is only so considered for a limited purpose, viz. the trial of the offender in *that county where the party dies*.

of pleas, and to hear and determine all treasons, felonies, &c. within their commissions, as fully as the court of King's Bench may do within the realm of England.

This statute (*q*) is not confined to the lordship's marchers, but the justices of assize have a concurrent jurisdiction, throughout all Wales, with the justices of grand sessions (*r*).

By 26 Geo. 2. c. 19. against plundering ships when wrecked, the felony, when committed in Wales, may be tried in the next English county.

Parry and Roberts were indicted under this act, in the county of Salop, for an offence committed in Anglesea; and it was objected that the trial ought to have been in Cheshire, as the next English county. But all the judges were of opinion that the trial was proper, and that Cheshire was not to be considered as an English county within either this act (*s*), or the 26 H. 8. c. 6.

5. *On the high seas, (t).*

By stat. 28 H. 8. c. 15. treasons, felonies, robberies, murders, and confederacies, committed in or upon the seas (*u*), or in any haven, river, creek, or place, where the

(*q*) Str. 533. 8 Mod. 134. felonies committed there, in  
4 Bl. Com. 303. the court of King's Bench, 1

(*r*) The statute does not extend to an appeal of murder, 1 Hale, 154. And such offences committed in those seas might be tried in the next county adjacent to the coast, by an indictment taken by the jurors for that county, before special commissioners, *ib*.  
1 Hale, 157. and with respect to trials for treason, stands repealed by stat. 1 & 2 P. & M. c. 10.

(*s*) Parry's case, Leach, 125. 8 Mod. 136. Hal. 156. 1 Haw. c. 31. s. 14. (u) The admiral never had jurisdiction in any creek, river, or port within the body of a county, 1 Haw. c. 37. s. 16. 2 Hale, 15, 16. 4 Inst. 137. And the statute does not ex-

(*t*) The realm of England comprehends the narrow seas, and it was formerly the practice to punish both treason and

admiral has, or *pretends to have* (x), jurisdiction, shall be tried according to the course of common law, and in such places and counties as shall be appointed by the king's commission (y), in like manner and form as if the same had been committed upon land.

This statute, with respect to treasons done at sea, is not repealed by 35 H. 8. c. 2. (z).

Upon this statute a doubt arose, whether one who was accessory, at law, to a felony committed at sea, was triable by the admiral within the purview (a) of it; but, by

tend to such places, *ib.* But be, within the body of a the stat. 15 R. 2. c. 3. authorises the admiral to inquire of deaths and mayhems done in ships hovering in the main streams of great rivers, only beneath the bridges of the same rivers, nigh to the sea. But this jurisdiction was concurrent with the common law. 2 Hale, 16. 54. The principal question arising upon the stat. 28 H. 8. c. 15. is as to the limits of the admiral's jurisdiction; i. e. whether the offence was committed at sea or within the county; for in the latter case the admiral has no jurisdiction, 4 Ins. 137. except in cases within the stat. 15 R. 2. c. 3. which has just been cited. According to Lord Hale, that arm and branch of the sea which lies within the fauces terræ, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county. 2 Hale, 16. 54. 4 Ins. 141. 13 Co. 52. According to a more accurate definition, an arm of the sea is to be considered as within the body of a county, where a man standing on one side can see what is done on the other; for there, according to Lord Coke, the county may well know the fact. 2 Haw. c. 9. s. 14. 13 Co. 52. 2 Roll. Ab. 169. 4 Ins. 140. 12 Co. 81. (x) I. e. between the high water mark and the low water mark, where the admiral has jurisdiction or not as the tide is in or out. 3 Ins. 113.; if, therefore, a man stricken on the high sea die upon the shore upon the reflux of the tide, the case is not within the admiral's jurisdiction. 2 Hal. 17. (y) 2 Hal. 16, 17. (z) 3 Ins. 112. (a) Yelverton, 134, 135.

the stat. 11 and 12 W. 3. c. 7. (b) accessories to piracy may be inquired of according to the stat. 28 H. 8. c. 15. Also by the same stat. piracies and felonies upon the sea, &c. may be inquired of in any place at sea, or upon land in his majesty's dominions, appointed by the king's commission. Also by the stat. 4 G. 1. c. 11, 8 G. 1. c. 24. and 2 G. 2. c. 28. several piratical offences therein mentioned, and by stat. 18 G. 2. c. 30. certain acts of hostility committed at sea in time of war, may be inquired of and tried in the admiral's court (c).

The stat. 1 Ann, stat. 2. c. 9. s. 4. for preventing the destruction of ships by masters or mariners, directs that such offences committed on the high seas, &c. shall be inquired of, tried, &c. and adjudged in such shires and places of the realm, as shall be limited by the queen's commission under the great seal, in such manner and form as by stat. 28 H. 8. s. 15. is directed for the trial of pirates.

The st. 11 G. 1. c. 29. s. 7. against the wilfully destroying any ship or vessel, enacts, that if the offence be committed upon the high seas, it shall be inquired of in such court and in such manner and form as by st. 28 H. 8. is directed and appointed for the inquiring, &c. of felonies done upon the high seas.

The stat. 33 G. 3. c. 67. against wilfully setting fire to any ship or vessel, directs that if any of the said offences shall be committed on the high seas, the offender may be tried at any admiralty, session, &c.

The st. 39 G. 3. c. 37. enacts, that all offences committed on the high seas, out of the body of any county, shall be offences of the same nature, and liable to the same punishments as if they had been committed on shore,

(b) Made perpetual by 6 (c) And see 2 & 3 Ann,  
G. 1. c. 19. c. 20. s. 35.



it may be laid to have been committed within the county where the inquiry is made (*m*), yet it seems more correct to aver according to the fact.

*In what county the indictment should be laid in particular cases at common law.*

It has already been seen that, by the stat. 1 & 2 P. & M. c. 10. (*n*) treason, committed in England and Wales, is to be tried according to the *due course and order of common law*.

But the statutes relating to treasons committed on the high seas, or out of the realm, have not been repealed, for these acts deprived the subject of no defence to which he was before entitled; on the contrary, they introduced a trial founded in the wisdom and benignity of the common law, with all the advantages incident to it, except in point of locality, which the nature of the case did not admit of (*o*).

With respect to the description of overt acts of *treason* within the realm, it seems to be now fully established, that one (*p*) overt act must be laid and proved in the

(*m*) Per Cur. 8 Mod. 141.

(*n*) So far repealing 32 H. 8. c. 20. and 33 H. 3. c. 23.

(*o*) Fost. 238.

(*p*) 1 & 2 P. & M. c. 10. s. 7. Dy. 132. a. Ld. Preston's case, 4 St. Tr. 447, 8. Sir H. Vane's case, Kel. 14, 15. Layer's case, 6 St. Tr. 260. Kelyng, C. J. p. 15. takes this distinction, that where a levying war is laid as an overt act of compassing the king's death, though laid within the county, it may be proved elsewhere; but, that where the le-

vying war is laid as the substantive treason, it is local, and must be laid in the proper county;—for a levying war in Surrey, may be good evidence to prove a compassing, &c. in Middlesex, and so tend to establish the treason there; but a levying war in Surrey does not prove a levying war in Middlesex. But C. J. Kelyng does not allege, as Mr. East, in his Pleas of the Crown, p. 126, seems to suppose, that where the levying war is laid as the treason, a levying war in ano-

county where the indictment is laid, and trial had according to the order and course of the common law, and that afterwards any overt acts of the same species of treason, committed elsewhere, may be given in evidence, though not alleged in the indictment.

Where a person, by means of an innocent agent, procures a *felony* to be done in another county, he is indictable there though not personally present. Girdwood was indicted (a) in the county of Middlesex for feloniously sending a threatening letter. It turned out in evidence, that the letter in question, directed to the prosecutor, had been delivered by the prisoner in *London*, to a person who put it into the post-office in *London*, whence it was conveyed regularly to the prosecutor in *Middlesex* :—and the twelve judges were unanimously of opinion that the prisoner had been properly tried in *Middlesex* (b). And in the case of the King v. Coombes, (c) before referred to, it was holden, that a person who, standing upon the shore, shot a man upon the high seas, was guilty on the high seas, since the offence is committed where the death happens, and not at the place whence the cause of the death proceeds. And on the same principle, if a man standing in the county A. (d) were to shoot

<p>ther county may not be evidence to shew the nature of the acts proved in the county where the treason is laid, as in the cases of <i>Damaree</i>, <i>Purchase</i>, and <i>Willes</i>, 8 St. Tr. 218., and <i>Deacon's case</i>, Fost. 8. The Chief J. asserts, that a levying war, if laid as the treason, must be proved within the county, and does not further allege that no levying of war, beyond the</p>	<p>county, can be proved in addition.</p> <p>(a) Under 27 G. 2. c. 15.</p> <p>(b) Leach. 169.</p> <p>(c) Leach. 432.</p> <p>(d) An unqualified person standing in one county, shoots at game in another, the offence, under 5 Ann. c. 14. is committed in the county where he stands. 2 Burn's J. ed. 20. p. 427. Show. 339. for there he <i>uses</i> the engine.</p>
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at and kill another in the the county B. it would no doubt be holden that the offender was guilty in B. But it would be otherwise if A. in one county should procure B. a *guilty* agent to commit a murder in a second, for in that case A. would be an accessory before the fact, and triable in the first county by virtue of the stat. 2 & 3 E. 6. c. 24. So if A. in one (e) county deliver poison to D. to be administered to B. as a medicine in another county, and D. not knowing that it is poison, administer it to B. in the second county, and B. die of it; or if a person in one county (f) procure a child, without discretion, to burn a house in a second, it is clear that the procurers in these cases will be principals in the felonies, though not present, and therefore ought to be indicted where the poisoning or burning is effected, though it would be otherwise if their agents were guilty as principals, since in that case the procurers would be accessories before the fact.

And in cases like these, it appears clear that the agency of the defendant, in a foreign county, may be inquired into at common law, in the county where the principal act is done, and that the poisoning or burning may be alleged to have been committed by the principal in the county where the act was done by the innocent agent. And according to Kelyng, C. J. where the act is of a *transitory* (g) nature, it may be inquired of by a jury though done in a foreign nation, as where a man marries one wife in France and another in England.

But where a transitory act does not happen within the county, it seems proper to lay the fact at some vill within the county, or after laying it at the true place, to add some vill within the county, under a *videlicet*, by way of

(e) 1 Hale, 616. Fost. 349. (g) Kel. 15.

(f) 1 Hale, 514. 617. Fost.

venue. In Lady Russel's case, (*k*) the defendants were indicted for a forcible entry, and for the forcible expulsion of the prosecutrix from her office. The prosecutrix held the office under letters patent, by which it was granted to R. B. for life, with remainder to the prosecutrix after his death, &c. The indictment, in stating the title of the prosecutrix, alleged the death of R. B. at H. in another county, and upon exception taken, the court of K. B. inclined to the opinion that the indictment was for this cause defective, but no judgment was given. But at all events, if an act of a *transitory nature* be laid at some place within the county, it may be proved to have been done elsewhere, and this even in case of an indictment for treason (*i*).

Where a clerk or servant has received his master's money in one county, for which he has refused to account to the master in another, it seems the (*k*) indictment should be laid in that county in which he refused to account.

The master residing in the county of Middlesex, the

(*k*) Cro. J. 17. There does not appear to be any good reason why an act of a transitory nature should not be alleged to have happened where it really did; the objection against laying a fact in a foreign county is in many instances a substantial one, founded upon the incapacity of a jury to make inquiry concerning facts *dehors* their jurisdiction, and where that objection applies, no form of pleading can obviate it; but where the radical objection does not apply, i. e. where the matter is *transitory* and may be inquired of in another county, it is not easy to say why the truth should not appear upon the record. The fact is, that the old common law restraint upon the inquiries of juries, has been in later times much relaxed, though the same strictness in the form of pleading has been retained.

(*i*) Kel. 15.

(*k*) Under the stat. 39 G. 3. c. 85.

servant received the sum of 10s. for him in the county of S.; upon his return to his master, in the county of M., he was asked whether he had brought the money; he answered that he had not received it, and in fact never did account for it.

Upon being indicted in the county of Middlesex, it was objected for the prisoner, that he ought to have been indicted in Surrey, and the question was reserved for the consideration of the judges, who were of opinion, "that the indictment was well laid; for there was no evidence of any act to bring the prisoner within the statute, until he was called upon by his master to account; when called upon by his master to account, the prisoner denied that he had ever received it: this was the first act, from which the jury could say, that the prisoner intended to embezzle the money."

"There was no evidence of the prisoner's having done any act to embezzle in the county of Surrey, nor could the offence be complete, or the prisoner be guilty, within the act, until he had refused to account to his master" (*h*).

In the case of the King *v.* Hobson (*i*), the prisoner had received the money in the county of Salop, and denied the receipt of it to his master in the county of Stafford; and when he went into the county of Salop, he persisted in that denial.

The judges (the point having been reserved) were of opinion, that there was sufficient evidence of a beginning to embezzle in the county of Salop, to make the offence triable in that county: and most of them thought, that the subsequent conduct of the prisoner, his not accounting to his master, and denying the receipt of the money, was evidence to shew that the original taking was with intent to secrete and embezzle, and so to steal

(*h*) *R. v. Taylor*, 3 B. & P. 596.      (*i*) 1 East. P. C. Addenda, p. 24.

within the meaning of the statute, and the more so as the act of secreting was a negative act; and some considered that the offence was triable in either county, as referable to the original taking in the one, and the not accounting, but denying the receipt when called upon in the other.

The rule of common law restraining jurors from inquiring into facts arising in another county, does not appear to have been at any time so strictly observed in misdemeanors inferior to treason and felony as in capital cases; for, as already observed, a party committing acts constituting a felony in two separate counties, might have been indicted of the misprision in either, though the jury, in trying the latter offence, must necessarily have taken cognizance of the entire felony (*k*).

So it has been holden, that a man, guilty of a nuisance in one county to the damage of another county, might be indicted in the first (*l*), or, according to Hawkins, in either county.

So where A. by reason of the tenure of certain lands in the county of B. is bound to repair a bridge in the county of C. if the bridge be in decay, he may be indicted in the latter county (*m*).

An usurious contract having been made in London, the lender received money as the borrower's agent in Middlesex, and on accounting in London for the amount of those receipts, deducted the usurious interest. It was holden, in an action founded on this transaction, that the venue was well laid in London; and it was intimated by the court, that when a penal action is founded on facts arising in two counties, the venue *ex necessitate* may be laid in either (*n*).

(*k*) Hale, 652.

(*m*) 5 T. R. 498. 5 H. 7. 3.

(*l*) Staun. b. 2. 91. 19 E. 3. contra.

Ass. pl. 6,

(*n*) 2 T. R. 233. 2 B. & P.

381.

An indictment (a) for a conspiracy may be tried in any county, in which an overt act has been committed in pursuance of the original illegal combination and design; so that where several conspired upon the high seas, to fabricate false vouchers to defraud certain commissioners in Middlesex, and in consequence those vouchers were delivered by innocent persons, their agents in Middlesex, the court intimated an opinion, that the offence had been properly tried in Middlesex, in analogy to the case of treason, which offence may be tried in any county in which an overt act has been committed.

So several defendants were holden to have been properly convicted upon an indictment for a conspiracy, though no joint conspiracy had been proved in the county where they were tried, but only overt acts done in consequence of a general conspiracy, evidenced by various acts in other counties (q).

And in case of *misdemeanors*, since all procurers are principals, the procurer is guilty of the offence wherever it is committed, in consequence of his procurement.

Thus if A. procure B. to publish a libel, A. is liable to be indicted (r) in every county in which B. publishes that libel (s). So if A. abroad, procure false vouchers to be delivered in Middlesex, which he has fabricated for the purpose of fraud, he is indictable in Middlesex (t).

An action of *scandalum magnatum*, which partakes of the nature (u) of a criminal proceeding, may be brought in any county, because the scandal raised of a peer reflects upon him throughout the kingdom.

Under the stat. 3 G. 2. c. 26. s. 4. against selling coals

(o) *R. v. Brisac*, 4 East, 164. (s) See also *Girdwood's case*,

(q) *R. v. Bowes and others*. post. and Leach, 169.

See 4 East, 171.

(t) *R. v. Brisac*, 4 East, 164.

(r) *R. v. Johnson*, 7 East, (u) *Gil. C. P.* 90.

## JURISDICTION—*Special Circumstances.*    27

represented to be of a different quality from what they really are, the offence is completed, and ought to be tried in the county in which they have been delivered, though the contract of sale was made in a different county (x).

But under the same stat. s. 13. the offence of filling sacks with coals for sale, without first having duly measured them at the wharf or warehouse, is local, and must be tried in the county where the wharf or warehouse lies (y).

Where time is an ingredient in the description of the offence, as in cases of homicide, where to inculcate the person striking, the death must happen within a year and a day after the stroke, or where a particular time is limited for commencing the prosecution by particular statutes, it is in general necessary, that the liability of the defendant, in point of time, should appear upon the face of the indictment; but this matter will afterwards be more fully considered, in common with the other averments connected with time (a).

Where the jurisdiction of the court depends upon particular circumstances, exclusive of the offence itself, it is frequently unnecessary to aver them upon the face of the indictment. Thus, though the common commission of gaol delivery extends only to prisoners in actual custody, it need not be averred upon the indictment, that the defendant was then in prison (b). So where the crown issues a commission to try certain persons in custody before a particular day, the indictment need not al-

(x) 4 East, 385.

is enacted by 21 Jac. 1. c. 4.

(y) 4 East, 385. By stat. 31 Eliz. c. 5. s. 1. relating to informations and actions upon penal statutes, the offence shall be laid to be done in the county where it was done. The same

with respect to actions by common informers.

(a) Stowe's case, Cro. J. 603. Doug. 235.

(b) Berwick's case, Fost. 10. 12 Mod. 449.



lege that the defendant was in custody before that day (c). So in an indictment for receiving stolen goods, under the statute 22 G. 3. c. 58., which authorizes the trial of the receiver for a misdemeanor, where the principal has not been convicted, it is unnecessary to aver, that the principal has not been convicted, though certainly it is that negative circumstance which gives the court jurisdiction (d).

(c) Berwick's case, Fost. 10. And in the case of Angus Macdonald, Fost. 59., where this answer could not be given, for upon the record, which alleged that the prisoner, at the time of arraignment (which was before the day limited by the commission), being brought to the bar in custody of the sheriff, to whose custody he had before been committed, &c. the day was past at the time of trial, it was thought fit to introduce the special averment into the indictment.

(d) Baxter's case, Leach, 660. 5 T. R. 85. Pollard's case, 2 Ld. Ray. 1370.

## CHAP. II.

*Of the Joinder of Parties and Offences.*

- I. *Joinder of Defendants, p. 29 to 36.*
- II. *Of Offences, p. 36 to 40.*
- III. *Of Defendants and Offences, p. 40 to 42.*

IT is next to be considered, what parties are to be selected as the objects of the charge; and, at the same time, it will be convenient to inquire, what offences may, in the same indictment, be charged against the same or different defendants.

It seldom happens that an indictment is defective for want of including a sufficient number of parties charged with the offence, since, technically speaking, torts are several in their nature; and where several join in the same criminal act, each is severally amenable to justice for the consequences.

And even where a duty is thrown upon several, each individual, so bound, is responsible for criminal omissions, as well as for criminal acts (*a*).

There are, however, some exceptions to this rule: thus, an indictment for a conspiracy cannot charge the offence against one only, for the very nature and essence of the crime exclude the idea of its commission by a single individual (*b*).

The same observation is applicable to an indictment for a riot (*c*), where the offence must be alleged to have

- (*a*) *R. v. Holland*, 5 T. R. 607.      *bury*, 12 Mod. 262. Com. Dig. Inf. D. 7. Salk. 593.
- (*b*) *Str.* 193.      *R. v. Sud-*      (*c*) *Ib.*

been committed by more than one. On the other hand, an indictment may be defective for charging too many, as where an indictment for *concealing* the death of a bastard child, alleged the presence of an accomplice (*d*).

Where a duty is thrown upon a body of people, as the inhabitants of a county, or of a particular parish, the indictment must not be confined to any smaller class (*e*) or subdivision. It was once indeed holden, that where a parish is situated in two counties, and a road in that part of the parish within one of the counties is out of repair, the indictment ought to be laid against the division of the parish which lies in that county (*f*); for the court thought, that if this were not allowed, there would be a failure of justice; but it was afterwards considered, that the doctrine was not tenable, and was founded in a mistake, since the whole parish might, by proper measures, be punished for the default (*g*).

With respect to the joinder of several defendants, in respect of the same or different offences, it may be considered,

1. When several may be *jointly indicted* in respect of the same offence.

2. What offences may be charged against the *same defendant* in the same indictment.

3. How far *different persons* may be charged in the same indictment with *different offences*.

1. The rule seems well established, that *several may be jointly indicted for offences arising wholly out of the same joint act or omission*.

Thus in the case (*h*) of obtaining money under false

(*d*) Jane Peat's case, East,  
P. C. 229.

(*e*) 5 T. R. 498.

(*f*) R. v. Weston, 4 Burr.  
2507. 5 Burr. 2700.

(*g*) 5 T. R. 498; i. e. by removing the indictment into the Court of K. B.

(*h*) R. v. Young, 3 T. R.  
98.

pretences, if several defendants act in concert together, though the pretence be conveyed by words spoken by one of them, yet they may all be jointly indicted under the statute (*f*).

So several persons have been convicted under the Black Act for a shooting at the prosecutor by one of them, and though they were all jointly charged with the single act, the indictment was holden to be good by all the judges (*g*).

So where several join in a conspiracy to give an untrue verdict (*h*), or join in a suit in the admiralty on a contract on land (*i*), or commit a joint trespass (*k*) upon two persons, or are jointly concerned in the publication of the same libel (*l*). So the husband and wife may be joined for the same treason, murder, trespass, or nuisance (*m*). So two may be jointly indicted for extortion (*n*), or for the omission of a joint duty (*o*), for the joint keeping of a gaming-house (*p*), the unlawful hunting and carrying

(*f*) 30 G. 2. c. 24.

(*g*) See the Coalheavers' case, Leach, 76. 576. 396. and 3 T. R. 105.

(*h*) 2 Haw. c. 25. s. 89.

(*i*) 2 Haw. c. 25. s. 89.

(*k*) 1 Salk. 384. R. v. Benfield, 2 Burr. 984. R. v. Clendon, Str. 870. contra.

(*l*) 2 Burr. 984.

(*m*) Salk. 385. Kel. 31. In burglary and other felonies, except murder, if the wife be present, she is presumed to act under the coercion of her husband. Kel. 31. But an indictment may be good, though it al-

lege that the husband and wife

jointly committed any other felony; for the coverture does not warrant more than a *prima*

*facie* presumption, that the wife acted under control. See 1

Hale, 516. And the husband may be convicted and the wife acquitted, upon the presumption of her husband's coercion.

See 27 Ass. 40. Fitz. Coron. 160. 2 E. 3. Staunf. P. C. f. 26. Kel. 37. 1 Hale, 516.

(*n*) 1 Salk. 382.

(*o*) 5 T. R. 498.

(*p*) 2 Haw. c. 25. s. 89. 10 Mod. 335. 2 Hale, 174.

away of deer (*q*). So two may be jointly convicted of maintenance (*r*).

But in all such cases, with the exception of conspiracy, riot, &c. though several defendants be jointly indicted, yet each might have been severally charged; and the rule is the same where a duty is thrown upon a body of persons, for each is severally liable for omissions as well as acts (*s*), and consequently, though several be charged jointly in the same indictment, some may be convicted and the rest acquitted, for the law looks upon the charge as several against each (*t*).

And the rule holds, though the parties concurring in the same act, be guilty of offences which differ in degree.

Thus if a wife join with a stranger in the murder of her husband, they may be jointly indicted, though the wife be guilty of petit treason, the stranger of murder only (*u*).

And the offence may be alleged to have been committed jointly by all whom the law considers as principals in the commission of any offence; and, therefore, in the cases of high treason, petit larciny, mayhem, and all misdemeanors inferior to felony, the act of one being in law the act of the rest, they may all be charged jointly with the commission of the offence (*x*).

In cases of felony, where several are present, some committing the act, the others aiding and abetting, the latter may be charged either as principals or as abettors (*y*). And where a statute treats a new felony, it possesses all the incidents to a felony at common law, and therefore makes all the aiders and abettors principals (*z*).

(*q*) 2 Haw. c. 25. s. 89.

(*x*) R. v. Johnson, 7 East, 605.

(*r*) 1 Vent. 302.

4 Bl. Com. 366. 1 Hale, 615.

(*s*) R. v. Hollond, 5 T. R.

(*y*) Vide the *Coalheavers'*

607.

case, Leach, 78.

(*t*) 2 Haw. c. 25. s. 89.

(*z*) *Ib.*

(*u*) Fost. 329. 2 Hale, 163.

Where several are guilty of different felonies in respect of the same transaction, though the act cannot, unless they be all present actually or constructively, be *jointly* charged, yet it is the common practice to join the principal and his accessories before and after the fact, in the same indictment (x).

Several present at the death of a man may be charged with different degrees of homicide in the same indictment: thus, if A. with malice abet B., who gives the blow *without malice*, it is murder in the former, and but manslaughter in the latter, and so it may be charged in the indictment (y).

But if the bill charge both with murder, and the grand jury find it murder in one, and but manslaughter in the other, there should be a new bill for manslaughter against the last (z).

But unless the offence arise *wholly* out of the same joint act or omission, the rule fails. Thus, if several jointly work at a trade within the statute of Elizabeth (a), they cannot be jointly indicted; for the want of qualification, by serving an apprenticeship, occasions the crime, and that defect is several in its nature and confined to each (b). So several cannot be jointly indicted for the same perjury (c), nor as common scolds (d), nor for the same barrety (e), nor for the non-repair of the street before their houses (f). And a misjoinder of this kind is fatal

(x) 2 Hale, 173.

(b) 1 Salk. 382. 1 Vent. 302.

(y) 3 Buls. 206. 2 Haw. 2 Roll. 81.

c. 29. s. 7. Taylor and Shaw's case, Leach, 398. Mackally's case, 9 Co.

(c) R. v. Phillips, Str. 921. 3 Leon. 230. Salk. 382. 6 Mod. 24.

(z) 3 Buls. 206.

(d) Str. 921.

(a) 5 Eliz. c. 4.

(e) Str. 921.

(f) 2 Haw. c. 25. s. 89.

in arrest of judgment (g), and would be equally objectionable on demurrer.

Kingston (h) and eight others were indicted for a joint contempt in disobeying an order of sessions, directing the payment of certain costs by commissioners, of whom the defendants were nine. The first count alleged, that notice of this order had been served upon four of the defendants named in the indictment, and also upon a fifth commissioner, who was not included in the indictment; and then charged those four and two others jointly with the contempt in refusing to obey the order. And upon a general demurrer it was held, that the count was bad; because it charged six with the contempt, four only having been personally served, and that it was necessary to allege a personal service upon all who should be charged with the contempt.

Where several are concerned in executing the same unreasonable design or conspiracy, it is desirable to include them all in one indictment.

In the reign of Charles the second, Sir Geoffery Palmer, attorney general, being directed to proceed against Messenger and others, who had conspired to pull down bawdy-houses, &c. proceeded by four separate indictments; and with this Kelynge, C. J. found fault: because by that means, he said, the king's evidence would be broken, whereas if all had been put into one indictment, the evidence as to the main design would have been entire against all; and then the assembling in several places to the same intent, had made the matter more foul, and would have been aptly given in evidence against all to the same jury (i).

(g) Str. 921.

(h) 6 East, 41.

(i) Though several be jointly indicted for the same crime, yet

Since every offence, though jointly charged, is in law the several offence of each defendant, it follows, that one or more may be convicted upon a joint indictment, and the rest acquitted (*k*).

And so it should seem, that in some instances, defendants jointly indicted may be convicted of offences differing in degree: for as two may be indicted jointly for the death of a third, though it be petit treason in the first, and but murder or manslaughter in the second, as alleged in the indictment, and as in a joint indictment it may be laid as murder in one, and but manslaughter in the other, there seems to be no reason why the jury, where two are jointly charged with murder, should not find one guilty of murder and the other of manslaughter, should the evidence warrant such a conclusion. It was holden, indeed, in Turner's case (*l*), that where several are

the indictment is several against each; and, except in an indictment for a conspiracy, riot, &c. they may be put severally upon their trials, Kel. 9. And if in such case some of them be found guilty by one jury, this is no cause of challenge to the rest, for the crime of each is several; one may be guilty, and not another, and the jury are to give their verdict upon the particular evidence against each, Kel. 9. Where several prisoners are put upon one jury, and sever in their challenges, the juror challenged by one must be withdrawn as to all; because,

the pannel being joint, a juror cannot be withdrawn as to one and serve as to another, 2 Hale, 268. 9 E. 4. 27. Plow. Com. 100. But, in such case, the pannel may be severed, and the same jury returned between the king, and every one of the prisoners, and then they are to be tried severally, and the challenge by one prisoner will not disable the juror as to the rest. Kel. 9.

(*k*) Kel. 9.; except in cases of riot and conspiracy, Str. 193. 194. Com. Dig. Inf. D. 7.

(*l*) 1 Sid. 171.



jointly indicted for a burglary, the jury cannot find one guilty of burglary and the other of larceny only; but there the very nature of the case precluded such a finding; for, one guilty of the felonious caption and asportation laid to constitute the burglary, must, in construction of law, have been present in the dwelling-house, and, therefore, guilty of the breaking and entering requisite for the commission of the offence. But upon a joint indictment for petit treason, if it turned out that one defendant was servant to the deceased, and the other a stranger; or if, upon a joint indictment for murder, it appeared, that he who abetted, acted of malice prepense, but that he who struck did not maliciously strike, the finding the parties guilty of offences differing in degree, would not be inconsistent.

## II. *Of charging several offences against the same defendant.*

If several felonies be charged (m) against a prisoner in the same indictment, it is no objection either upon demurrer, or in arrest of judgment; for on the face of an indictment, every distinct count imports to be for a different offence. But if it appear, before the defendant has pleaded or the jury are charged, that he is to be tried for separate offences, it has been the practice for judges to quash the indictment, least it should confound the prisoner in his defence, or prejudice him in his challenge of the jury; for he might object to a juryman's trying one of the offences, though he might not object to his trying the other. But if the joinder of two distinct felonies be not discovered before the prisoner has

(m) 8 East, 41. East. P. C. 106. 2 Hale, 173. contra, cites 515. Per Buller, 3 T. R. 21 E, 4.

### *Of several Offences against the same Party. 37*

pleaded, the court in its discretion may put the prosecutor to elect on which he will proceed (n).

But though two different felonies ought not to be included in the same indictment against the same defendant, yet the same act may be charged as a different offence in different counts (o). Thus a count for a robbery may be joined with another for stealing privately from the person (p); and Lord Hale speaks of a bill, containing two offences, as burglary and theft, forcible entry and detainer, as usual in practice (q).

A prisoner may be indicted for petty treason and murder at the same time, and may be found guilty of the murder, and acquitted of the treason (r).

If the special description of the offence in the indictment include a more general offence, the prisoner may be found guilty of the latter and acquitted of the former. Thus if an indictment for burglary be laid with a felony to the amount of 40s., the prisoner may be acquitted of the burglary, and be found guilty of stealing in the dwelling-house to the amount of 40s. (s).

So under an indictment for burglariously breaking in and stealing, the charge may be modified by shewing a stealing without any breaking in (t).

(n) 3 T. R. 106. Leach, 568. 531. R. v. Jones, 2 Camp. 132. R. v. Kingston, 8 East, 41.

(o) Leach, 568.

(p) Leach, 531. Qu. whether this be consistent with the oath of a grand juror?

(q) 2 Hale, 163, 173. Yel. 99. Ford's case.

(r) Leach, 512. Fbst. 328. 106. 10 St. Tr. 36.

(s) Leach, 102, 816.

(t) Leach, 816. But in such case an acquittal of the burglary would amount to an acquittal of the burglary; for, though the allegation of the theft be a sufficient allegation of the felonious intention, yet when acquitted of that, the matter stands as if he had been indicted for the breaking without any felonious intent. See 1 Hale, 560. East. P. C. 348. 518. 1 Sid. 171.

So under an indictment for stealing in a dwelling-house and putting in fear, the prisoner may be convicted of a simple larciny (*u*).

And *in general* whenever an offence, as described in the indictment, is made up partly of facts and circumstances which constitute a less aggravated offence, and partly of circumstances peculiar to itself, the defendant may, if the evidence warrant such a conclusion, be found guilty of the more simple and acquitted of the more serious offence. So that where the indictment charges the defendant with petit treason, he may be found guilty of murder, or of any inferior species of felony, the treason being a circumstance of aggravation of which the defendant may be acquitted, and yet found guilty of the substantial part of the charge (*x*).

So a man indicted for murder may be acquitted of the

(*u*) Leach, 771.

(*x*) Fost. 328. 1 Hale, 378, 449. 2 Hale, 184, 302. 2 Haw. c. 47. s. 8. Radbourne's case, Leach, 513. 2 Haw. c. 23. s. 95.

But the converse of the proposition is not so clear, for by charging the defendant with murder, where the facts amount to petit treason, he is barred of his right to a peremptory challenge of thirty-five, and the judgments are different; and, on this account, Mr. Justice Foster, though he was satisfied that petit treason and murder are in law but one offence, said, that if, on an indictment for murder, the prisoner appeared

to have been guilty of petit treason, it would not be advisable to direct the jury to acquit, least the defendant should afterwards plead *autre-fois acquit*, but that he (if the case occurred) should discharge the jury of that indictment, and direct a fresh one to be preferred, Fost. 328.; and see the case of Swan and Jefferies, Fost. 304. So if the indictment charge a misdemeanor below felony, and the offence upon trial appear to be felony, it seems the defendant ought not to be found guilty of the misdemeanor, but should be indicted afresh for the felony. See R. v. Cross, 12 Mod, 520. 634.

*Of several Offences against the same Party.* 39

murder and found guilty of manslaughter, because manslaughter is included in the charge of murder. The offences differ only in the circumstance of malice prepense, which, taken from a charge of murder, reduces it to manslaughter, and added to circumstances amounting to manslaughter, constitutes murder (y). And for this reason it is in many instances unnecessary to subjoin to a special count describing the *aggravated offence* other counts, which differ only in the *omission of the particular allegations* in which the aggravation consists (z).

But the above rule must be understood with this limitation, that a charge of felony cannot be modified into a misdemeanor, since the defendant would thereby lose the benefit of full counsel, of a copy of the indictment, and of a special jury (a). Judgment, therefore, cannot be pronounced as for a trespass, where the defendant has been convicted of stealing that which is not the subject matter of felony (b).

So if the indictment charge a felony, and the facts found by a special verdict amount to a *misdemeanor* only, judgment cannot be given as for a *trespass* (c). And if two be indicted for felony, and it turn out to be felony in one, and but trespass in the other, the latter is entitled to an acquittal (d).

And it is improper to prefer two indictments at the same time for the same act, one laying it as a felony, and the other as a misdemeanor (e).

And since different judgments are required, it seems

(y) *Fost.* 328.

(b) *R. v. Westbeer*, Str.

(z) Even though the special count conclude against the statute. See tit. Ind. on Statute.

1133. 2 H. 7. 10. b. contra. Kel. 29. 2 Haw. c. 47. s. 8.

(c) *Ib.*

(a) *Leach*, 15. Vid. *Cro. Car.* 332. *Cro. J.* 497. *Kel.* 29. *R. v. Scholefield*, *Cald.* 401. 1 And. 351.

(d) 2 Haw. c. 47. s. 8.

(e) *Doran's case*, *Leach*, 608.

that the joinder of a count for a felony, with another for a misdemeanor, would be holden to be bad upon demurrer, or after a general verdict, upon motion in arrest of judgment (*f*). But it is no objection to an indictment, that it charges different misdemeanors upon the defendant in different counts, for the judgment is the same (*g*).

### III. *Of the Joinder of different Persons and different Offences.*

But though an indictment would be vicious which alleged that several persons, jointly, committed an offence, which from its nature must have been the several offence of each; yet if, in the same indictment, as found by the grand jury, *several offences* be alleged to have been committed by *several persons*, no advantage it seems can be taken, either upon demurrer or in arrest of judgment, though the court will, in its discretion, either quash the indictment altogether, or use such measures as shall obviate any inconvenience (*h*) to the defendants which might otherwise arise. For the charging the offences to have been committed severally, makes each such charge a separate indictment. And though there are instances where indictments have been quashed for charging several offences to have been committed by several persons, as against several officers, *quod colore officiorum suorum separaliter* (*i*), *extorsive ceperunt*, &c.; yet there are a great number of authorities which shew that an indictment charging the offences to have been committed *separaliter*, would be good.

Thus, though an indictment against four persons for

(*f*) 3 T. R. 108.

(*h*) 3 T. R. 106. R. v.

(*g*) 3 T. R. 108. 2 Burr.

Kingston, 8 East, 46.

984. 8 East, 41. R. v.

(*i*) 2 Hale, 174,

Jones, 2 Camp. 132.

erecting four several inns, and selling victuals to travellers *ad commune nocumentum* (k), was quashed, yet it was for want of alleging that they did the acts *separaliter*, which would have made the charges as several indictments.

And according to Lord Hale (l), "It is common experience at this day, that twenty persons may be indicted for keeping disorderly houses, and they are daily convicted upon such indictments, for the word *separaliter* makes them separate indictments."

But it seems, that to warrant such a joinder in the same indictment, the offences must be of the same nature, and such as will admit of the same plea and the same judgment (m).

It does not appear to have been allowable to join charges of different felonies against different persons, in the same indictment, unless such felonies arose out of the same transaction.

But where the felonies have been immediately connected, as in the case of a principal and his accessories, either before or after the offence, it has been the usual course to include them in the same indictment (n).

(k) 2 Roll. Rep. 345, and (m) 8 East, 46. 2 Hale, 174.  
per Lawrence, J. 8 East, 47. 3 T. R. 106. 2 Camp. 132.  
2 Hale, 174. (n) 2 Hale, 173.

(l) 2 Hale, 174. 3 T. R. 106.

## CHAP. III.

*Of the Description of the Defendant.*I. *At common Law.*II. *Under the Statute of Additions, p. 44.*

I. AT common law it seems to have been sufficient to describe the defendant by his christian and surname, unless he was of the degree of a knight or some higher dignity, in which case the name of dignity (*a*) was required to be added to the name of baptism and surname (*b*), or in case of nobility, to supply the place of the surname. And if he were indicted in respect of his office (*c*), an addition of his office was necessary. With respect to the name of the party, there is much doubt in the books, whether certainty of both christian and surname was required in an indictment.

According to some authorities, the defendant was bound to answer to an indictment for felony, though his *name of baptism* was mistaken (*d*).

(*a*) 11 H. 4. 40. Com. Dig. name of baptism. Hankford, Ind. G. 1. 2 Ins. 665, 666. justice, held, generally, that misnomer could in *no case* be

10 E. 4. 16. 11 H. 6. 11. pleaded to an indictment for

(*b*) 2 Ins. 665, 666. *felony*. In 3 H. 6. 26. there is

(*c*) Com. Dig. Ind. G. 1. nothing more than an *obiter*

(*d*) Lord Hale (2 Hale, 238.) *dictum* by Rolfe the counsel, and this is directly contrary to the Abbot of Colchester's case, 11 H. 4. 41. See Gerard's case, 2 Hale, 237. 2 Haw. c. 25. s. 68, 69.

But the case 1 H. 5. 5. is not a direct authority for this purpose, for there the misnomer was of the surname, and not of the

According to others, no advantage could be taken of a mistake in the *surname*, (e) though there might of a mistake in the *christian name* (f).

But Lord Hale was of opinion that it was safest to allow a plea of misnomer of either christian name or surname (g). And it is difficult to conceive why the one should not be allowed as well as the other; the reason of requiring certainty, in either case, is in order to identify the party arraigned or outlawed with the person against whom the indictment is found, for which purpose certainty in both christian and surname is material, of the latter indeed more than the former, since there is a greater variety of surnames than of names of baptism; and therefore the former serve to identify with greater precision than the latter.

In a recent case it was holden, that one indicted for a misdemeanor might plead that his name was Shakespeare, and not Shakepeare, for the latter is not *idem sonans* (h).

And it has been holden that a person cannot have two christian names, and therefore an indictment was quashed which described the defendant by the name of Elizabeth Newman, *alias* Judith Hancock (i). But the defendant

(e) 1 H. 5. 56. Staunf. P. C. name was Alexander; and all the judges held, that if  
1. 3. c. 18. f. 182.

(f) 2 Haw. c. 25. 68, 69. Alexander Gordon, upon such  
11 H. 4. 40. 2 Hal. 238. an attainder, had been brought  
Layers's case, 6 St. Tr. 237. to the King's Bench bar, and  
had made this matter appear,

By an act of attainder, 1 G. had made this matter appear,  
1. it was enacted, that if Ma- the court could not have  
jor-General Thomas Gordon, awarded execution against  
Laird of Auchintoule, should him. 1 P. Wills. 617.

not render himself before such (g) 2 Hale, 176.

a day, he should be attainted (h) R. v. Shakespeare, 10  
of high treason. Major- East, 83.

General Gordon's christian (i) 1 Ld. Ray. 562.



may be described by a second surname if it be laid under an *alias*, for a man may be known by two surnames (*k*).

If the defendant, in an appeal or indictment, plead misnomer of his surname, the plaintiff or the king may aver *que conus per l'un nosme et l'autre* (*l*). But little advantage is gained by a plea of this nature; since, as will afterwards be seen, the defendant must in his plea set forth his real name, upon which a new indictment may be found, which will conclude him (*m*).

But in some instances an indictment at common law is good, without naming any person certain, as if it state an highway to be out of repair through the default of the inhabitants, without naming them (*n*).

## II. *Under the statute of additions.*

To prevent the inconvenience of mistaking one person for another, which might frequently arise were the party to be described by his name only (*o*), the stat. 1 H. 5. c. 5. enacts, that in all appeals and indictments, in which the exigent shall be awarded, to the names of the defendants, additions shall be made for their *estate, or degree, or mystery, and of the towns, hamlets, or places, and counties*, of which they were or be, or in which they be or were conversant; and then directs, that if these additions be omitted, any outlawry pronounced on the process shall be bad, and that before the outlawries pronounced, the said writs or indictments, shall be *abated* by the exception of the party wherein the said additions be omitted.

Under this statute it has been holden, with respect to

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| ( <i>k</i> ) Semple's case, Leach,    | ( <i>m</i> ) 2 Hale, 238.             |
| 469. 1 H. 7. 28. Bro. Misno.          | ( <i>n</i> ) 2 Roll. Ab. 79.          |
| 47.                                   | ( <i>o</i> ) 21 E. 4. 72. 2 Ins. 670. |
| ( <i>l</i> ) 1 H. 7. 29. 2 Hale, 238. | 2 Hale, 176. 2 Haw. c. 23.            |
|                                       | s. 105.                               |

*estate or degree*, that these two words are of the same signification, comprehending the nobility, clergy, graduates in any profession, and those under the degree of nobility, as yeomen, &c. (*p*); that the party must be described by his present estate or degree (*q*); and therefore, to describe him as *nuper armiger*, &c. is insufficient. That he cannot be described by any dignity, which he holds in any nation except England; (*r*) yet it has been said, that an Irish bishop may be described by the addition of his diocese (*s*).

The degree of serjeant at law, is a good addition (*t*); so for a man, esquire, gentleman (*t*), yeoman (*u*), and labourer, are good additions; but burgess (*x*), citizen (*y*), and servant (*z*) are too general.

The defendant may be described by his dignity by creation, (*a*) as earl; by his name of dignity, as garter (*b*); by his reputed degree, as if a yeoman be styled gentleman, it will be sufficient, if he be so reputed (*c*); but if he be not so reputed, the indictment may be quashed (*d*); so if the defendant be described Sir I. S. knight, he may plead that he is a baronet (*e*).

The addition of office is insufficient, unless the party be indicted in respect of his office (*f*). So to describe

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| ( <i>p</i> ) 2 Ins. 666.              | ( <i>x</i> ) 2 Ins. 668.               |
| ( <i>q</i> ) 9 E. 4. 2. 22 E. 4. 13.  | ( <i>y</i> ) Ib.                       |
| 21 H. 6. 3. 3 Ins. 670.               | ( <i>z</i> ) Ib.                       |
| ( <i>r</i> ) Leach, 620. 9 Co. 118.   | ( <i>a</i> ) 2 Ins. 666. Com. Dig.     |
| Mary Graham's case, Salk. 451.        | Ind. G. 1.                             |
| ( <i>s</i> ) Year-book, 21 H. 6. 3.   | ( <i>b</i> ) 2 Haw. c. 25. s. 69. Cro. |
| pl. 4. A degree in the uni-           | Eliz. 224. 542.                        |
| versity is a good addition, 2 Ins.    | ( <i>c</i> ) 2 Ins. 668.               |
| 668. 2 Haw. c. 23. s. 100.            | ( <i>d</i> ) 2 Ins. 667, 668.          |
| ( <i>t</i> ) 2 Ins. 667, 668. B. Add. | ( <i>e</i> ) 2 Haw. c. 25. s. 69. Cro. |
| 347.                                  | Car. 371. Jones, 346.                  |
| ( <i>u</i> ) B. Add. 5.               | ( <i>f</i> ) Com. Dig. Ind. G. 1.      |

one as an extortioner, maintainer, or by any other unlawful practice, is bad (*g*).

When a person has two names of dignity, the highest is most proper (*h*).

In an indictment against a peer no addition is necessary, unless it be for treason, felony, or breach of the peace; for in other cases no process of outlawry lies against him (*i*).

A female may be described as single woman, spinster, widow (*k*), the wife of I. S. yeoman (*l*); but to describe her as A. the wife of B. *spinster*, is bad, for spinster may be referred to either A. or B. (*m*).

But an indictment against J. B. husband of E. B. late of C. yeoman, is good, because yeoman cannot be applied to the wife (*n*).

If a gentlewoman be named spinster, she may plead in abatement; for, according to Lord Coke, she has as good a right to that addition as a baroness, viscountess, &c. has to hers (*o*).

Where the defendant is of the greater order of nobility, the description of his dignity precedes that of the place, as Edward, duke of Buckingham, late of N. in the county of G. (*p*).

But, in case of the lesser nobility, such as baronets and knights, the description is different, and runs thus—A. B. late of M. in the county of N. knight, &c. (*q*).

(*g*) 2 Ins. 668.

(*n*) Dyer, 47. 2 Hale, 177.

(*h*) 2 Ins. 669.

(*o*) 2 Ins. 668.

(*i*) Cro. Eliz. 148. Lord Dacre's case, 2 Hale, 177. 199. Cro. Eliz. 503.

(*p*) 2 Ins. 669. So where one is named of a city, which is a county of itself, as J. S. baker, of London, in the county of the city of London,

(*k*) B. Add. 66. 10 H. 6. 21.

(*l*) Gower's case, Dy. 47. a. Cro. Eliz. 750. 4 H. 6. 4. b.

but J. S. of London, baker, would be sufficient. 4 E. 4. 10.

(*m*) Dyer, 47. 2 Hale. 177.

(*q*) 2 Ins. 669.

An addition after an *alias dictus* is insufficient (*r*), it must be subjoined to the first name; and after an *alias dictus* it is unnecessary (*s*). Though several defendants have the same addition, it should be repeated after each; (*t*) where both the name and addition are the same, there should be some further description added for the sake of distinction (*u*). It is laid down, by Serjeant Hawkins, that a defect as to the addition of one of several defendants will vitiate the indictment as to all (*x*); but this seems to be erroneous and unreasonable, for the law considers the indictment as several against each of the several defendants (*h*).

With respect to the addition of the party's mystery, the following are sufficient.

Labourer (*z*), husbandman (*a*), merchant (*a*), broker (*b*), taylor (*c*), hostler (*d*), smith (*e*), miller (*f*), carpenter (*g*), brewer (*h*), baker (*i*), butcher (*k*), parish clerk (*l*), mercer (*m*), fishmonger (*n*), dyer (*o*), schoolmaster (*p*), scrivener.

The following are insufficient:

Maintainer (*q*), extortioner (*r*), vagabond (*s*), here-

- |   |   |
|---|---|
| ( <i>r</i> ) 2 Ins. 669. Semple's case, Leach, 469. Cro. Eliz. 583. Dyer, 88. Cro. Eliz. 249. | ( <i>e</i> ) 21 H. 6. 54.<br>( <i>f</i> ) B. Add. 39. 51.<br>( <i>g</i> ) B. Add. 15. 39. |
| 198. Staunf. 68. 2 Hale, 177.   | ( <i>h</i> ) Fitz. Utl. 32. 37. 2   |
| ( <i>s</i> ) 2 Haw. c. 25. s. 70.   | Hale, 177. 7 E. 4. 10.  |
| ( <i>t</i> ) 2 Haw. c. 25. s. 70.   | ( <i>i</i> ) 6 E. 4.  |
| ( <i>u</i> ) 2 Haw. c. 25. s. 70.   | ( <i>k</i> ) B. Add. 42.  |
| ( <i>x</i> ) 2 Haw. c. 25. s. 70.   | ( <i>l</i> ) B. Add. 52. 62.  |
| 1 Bulstrode, 183.   | ( <i>m</i> ) 2 Ins. 668.  |
| ( <i>y</i> ) Hale, 177. 14 H. 6. 15,  | ( <i>n</i> ) 19 H. 6. 51.   |
| ( <i>z</i> ) 2 Ins. 668.  | ( <i>o</i> ) 5 H. 5. 7.   |
| ( <i>a</i> ) Br. Add. 44. 50.   | ( <i>p</i> ) 2 Leon. 186.   |
| ( <i>b</i> ) B. Add. 8. 9 H. 6. 65.   | ( <i>q</i> ) 9 H. 6. 65. 2 Ins. 668.  |
| ( <i>c</i> ) B. Add. 15. 39.  | ( <i>r</i> ) 9 H. 6. 65.  |
| ( <i>d</i> ) B. Add. 35. 21 H. 6. 50.   | ( <i>s</i> ) 22 E. 4. 1. 2 Ins. 668.  |

tic (*s*), common informer; so servant, chamberlain, butler, &c. for these do not denote any particular mystery (*t*), and the addition of farmer is questionable (*u*).

*Of the addition of the town, hamlet, or place and county,*

It is sufficient to describe the plaintiff as *late* of such a place (*x*); but he must be plainly averred to be of the place, as of London, or of Norwich; and it has been holden to be insufficient to describe him as *mercator de London* (*y*). If there be two towns of the same name, he ought to be named of one of them with certainty; thus, if there be *D. magna* and *D. parva*, the addition of *D.* alone would not be good (*z*), and the defendant might plead, that there are two Dales in the same county, called Great Dale and Little Dale, and none without an addition.

So if the same place be sometimes called North Dale and sometimes South Dale, but never Dale simply, the defendant may plead that there is no such town, because a part of a name is not equivalent to the whole (*a*). But if there be two towns of the same name, without any addition to distinguish them, it seems sufficient to describe the defendant as of that place generally (*b*),

So it seems, that to describe the defendant as *A. parson of D.* is insufficient, since he may be parson without residence (*c*).

(*s*) 1 Roll. 190. 22 E. 4. 1. H. 7. 4. Rast. 47. 3 H. 6. 8.

(*t*) B. Add. 50. 58. 2 Ins. 7 H. 6. 45.

668.

(*a*) 2 Haw. c. 23. s. 121.

(*u*) 2 Ins. 668. B. Add. 10. 3 H. 6. 8. 14 H. 6. 23. cont.  
28 H. 6. 4. 7 H. 6. 23.

(*x*) 2 Ins. 669.

(*b*) 2 Haw. c. 23. s. 121.

(*y*) 4 Ed. 4. 10.

(*c*) Com. Dig. Ind. G. 1.

(*z*) 2 Ins. 669. 7 H. 6. 39. qu. et vid. 2 Ins. 669. where  
19 H. 6. 35. 21 E. 4. 51. 10 it is said, that the law will pre-  
sume residence.

Where a hamlet is parcel of a town, and therefore an inhabitant of the former is also an inhabitant of the latter, the defendant may be described to be of either (*d*).

The statute uses the general term, *place*; if, therefore, the defendant live in any place which has a certain name, it is sufficient to describe him to be of that place, though it be neither a town nor a hamlet (*e*); and it is sufficient to describe the defendant by his parish (*f*), if it contain no more than one town or hamlet, which will be intended until the contrary appear.

Next as to the *county*.—Where a city is a county of itself, it seems that it is sufficient to name the defendant of the city or county generally, as to describe him as late of London, or late of Norwich; for though the city and county be not co-extensive, it is to be intended, that he is an inhabitant of both, till the contrary appear (*g*).

But the county must in all cases be shewn, for the statute mentions the county conjunctively (*h*) with town, or hamlet, or place.

The addition of the wife's place of residence is sufficiently shewn by averring that of the husband, because their residence is presumed to be the same till the contrary be proved (*i*).

It is a general rule, that a defect of this nature must be pleaded in abatement, and that it is cured by the appearance of the party, and his pleading any other matter; for he is estopped by his plea by that name, and the gaoler and sheriff, who do execution, shall have advantage of the estoppel (*k*).

(*d*) 2 Ins. 669. 35 H. 6. 69.

14 H. 6. 23. So he may be described of either, if he had two places of residence. 2 Haw.

c. 23. s. 109.

(*e*) 2 Ins. 669.

(*f*) 2 Ins. 669. 2 Haw. c. 23.

s. 120.

(*g*) 2 Ins. 669. 21 E. 4. 15.

2 Haw. c. 23. s. 120.

(*h*) Cro. J. 167. 2 Ins. 669.

2 Haw. c. 23. s. 120.

(*i*) 2 Ins. 669. 2 Theol. b. 6.

c. 14. s. 6. 2 Haw. c. 23. s. 124.

(*k*) 2 Hale, 175. 2 Ins. 669.

Cro. Eliz. 60.

## CHAP. IV.

*Of the general Averments of Time and Place.*I. *Averment of Time*, p. 50.II. *Averment of Place*, p. 57.

**T**HE next averments, in the usual order of indictments, relate to the time and place of committing the offence.

The averment of *place* is partly substantial and partly formal; substantial, since it shews the offence to have been committed within the jurisdiction of those who inquire into it, and formerly it was essential to the procuring a jury to be returned from the neighbourhood; formal, because it is satisfied by proof of the commission of the offence within the county, without regard to the particular vill stated in the indictment. The averment of *time* is altogether formal, since it is unnecessary to prove the offence to have been committed at the time alleged in the indictment, unless some time be limited for the prosecution, or time itself be material to the constitution of the offence: these averments therefore convey, in general, little of information either to the defendant or his judges. It is nevertheless a general rule, that the time and place (*a*) of every material fact must be plainly and consistently alleged; and such a degree of precision does the law exact in this respect, that any uncertainty or incongruity in the description of time and place will vitiate the indictment.

I. With regard to *time*, it is requisite (with some exceptions) to shew both the *day* and the *year* on which the offence was committed. It is most usual to specify the year of the king's reign, but it is sufficient if the year be pointed out by other means: thus, in the case of the regicides, no year of any king was laid for the king's mur-

(a) 5 T. R. 620. 2 Haw. c. 25. s. 77. F. Ind. 29. Dyer, 164. 2 Hale, 177.

der, but the compassing of his death was laid in January, in the 24th year of Charles the I. and the murder was laid on the 30th day of the same month of January (*b*).

It is insufficient to state the day of the month without the year (*c*).

But the indictment will be good if the day and year can be collected from the whole statement, though they be not expressly averred, as where the time of the caption of the indictment is stated, and the offence laid to have been committed *primo die post Pasch. ult.* (*d*). So an indictment laying the offence on the Thursday after the day of Pentecost, in such a year, is good (*e*). So if it lay it to have been committed on the 10th of March *last*, if the year can be ascertained by the style of the sessions before which the indictment was taken (*f*).

With respect to the *day*, it has been adjudged, that it is sufficient in a conviction to allege the offence to have been committed in the interval between two days specified: thus in the *King v. Chandler* (*g*), a conviction of the defendant for having killed ten deer, between the 1st of July and the 10th of September, was holden to be sufficient. A similar conviction for having killed one deer was afterwards holden to be good in *Simpson's* case (*h*). But the court, in the former case, decided on the ground of distinction between convictions and informations or in-

(*b*) Kel. 11.

(*c*) Com. Dig. Ind. G. 2.

(*d*) Ibid. and 2 Haw. c. 25. s. 78.

(*e*) 7 H. 6. 39.

(*f*) Lamb. b. 4. c. 5. f. 491. 2 Haw. c. 25. s. 78.

(*g*) Ld. Ray. 581. This mode of pleading has long been usual in informations upon penal statutes. See the Prece-

dents cited, Ld. Ray. 582. and

see 10 Mod. 248.; and there

does not appear to be any reason why the offence should not be

so laid in indictments, where

the day cannot in fact be ascertained; but it is safer to aver

some day, though it cannot be proved.

(*h*) 10 Mod. 248. 341.



dictments. An information charging the defendant with having been guilty of divers extortions, during a specified time, was deemed to be insufficient on motion in arrest of judgment (*h*); and the court said, it might as well be said an indictment for battery would be good, setting forth that the defendant beat so many of the king's subjects between such a day and such a day, as that the principal indictment was good (*i*). An indictment charging a person that on such a day, and on divers other days and times, he kept a gaming-house, was holden to be good; but as it was uncertain as to all except one day, it was holden that no more than one penalty of forty shillings was recoverable, for the offence on the day which was named with certainty (*k*).

In appeals, the statute of Gloucester required that even the hour should be specified, whence it appears that it was not essential at common law, to state the hour even in appeals, in which as great, and in some respects greater (*l*), certainty was expected than in indictments. In an indictment, however, for burglary, it certainly is necessary to aver that the offence was committed in the *night-time*, and it is usual to allege the hour; and in one case an indictment was holden to be defective for omitting it (*m*).

But under the stat. 39 Eliz. c. 15. it seems to be sufficient to aver that the offence was committed *tempore diurno*, without specifying the particular hour (*n*).

And in general it is unnecessary to mention the hour in an indictment; and if it be insufficiently alleged, no exception can on that account be taken (*o*).

(*h*) R. v. Roberts, 4 Mod. 101.

(*i*) See also 2 Haw. c. 25. s. 82.

(*k*) R. v. Dixon, 10 Mod. 335.

(*l*) 2 Haw. c. 25. s. 76.

(*m*) Burn's Justice, tit. Burglary. R. v. Waddington, East's P. C. 513.

(*n*) 2 Hale, 179.

(*o*) Clarke's case, 1 Bulst. 203.

In alleging a mere neglect or non-performance, it is unnecessary to specify either time or place (*p*), as in an indictment against a defendant for not having scoured out a ditch (*q*).

Where an offence is committed by the doing of several acts at separate times, they may be stated to have been done at the same time.

Thus in a prosecution under the stat. 7 G. 3. c. 50. s. 1. against secreting letters containing any bank notes, &c. it appeared that a bank note had been cut into two parts, that the parts had been sent in separate letters at different times, and secreted at different times by the prisoner. The indictment alleged that the defendant did secrete the said letters *then and there* containing the said bank note. The prisoner was convicted, and the judges, upon a case reserved, were of opinion that the conviction was proper (*r*). And in an indictment for high treason, where the overt act consists in levying war, it may be charged to have been committed in one day (*s*).

The allegation of time and place must be repeated in the averment of every distinct material fact; but after the day, year, and place, have once been stated with certainty, it is afterwards, in subsequent allegations, sufficient to refer to them by the words, *et adtunc et ibidem*, and the effect of these words is equivalent to an actual repetition of the time and place (*t*).

But the mere copulative, without the *adtunc et ibidem*, would in many cases be insufficient.

(*p*) Com. Dig. Ind. G. 2. (*r*) R. v. Mopre, Leach, 2 Haw. c. 25. s. 79. 655.

(*q*) Lamb, b. 4. c. 5. f. 492. (*s*) Fost. 8.

2 Haw. c. 25. s. 79. (*t*) Dyer, 28. 2 Hale, 178. Keil. 100. 4 Co. 41. Str. 901.

Thus to aver that A. at such a time and place, made an assault on B. and with a certain sword feloniously struck, &c. is bad, without saying *then and there* (u).

But if the indictment allege that A. feloniously, and of malice aforethought, made an assault, and with a certain sword, &c. *then and there* struck, &c. this is sufficient; for by the words *then and there*, the words *feloniously and of malice aforethought*, before applied to the assault, are connected with the stroke, and if this were not permitted it would occasion much tautology and repetition (x).

So in Nicholson's case (y) it was holden by the judges, that an indictment was sufficient which alleged that the prisoner did wilfully, feloniously, and of malice aforethought, mix poison, to wit, arsenic, with flour and milk, with intent that the same should be afterwards baked and eaten by the deceased, and the said flour and milk, so mixed with the poison as aforesaid, did with the intent aforesaid *then and there* deliver to the deceased, &c.

According to Lord Hale (z), this nicety is required in *favorem vitæ*, and in some cases of misdemeanor the like strictness has not been observed; thus an indictment against A. alleged, that at such a time and place, upon one B. he made an assault, *and* beat the said B., without saying, and *then and there*; yet it was holden to be sufficient, and it was said that the day and place named in the beginning extended to all the ensuing acts (a). So it has been holden, that in an indictment it would be sufficient to say, *quod primo M. intravit et ipsum disseisivit*, without the *adtunc et ibidem* (b).

(u) 2 Hale, 178. 2 Haw. c. 23. s. 88. Cro. Eliz. 739.

(x) Heydon's case, 4 Co. 41. Godbolt, 65, 66. Dyer, 69.

(y) East. P. C. 346.

(z) 2 Hale, 178.

(u) 2 Hale, 178.

(b) Baude's case, Cro. J. 41. Dyer, 69.

But where, in order to constitute the offence, connected acts must be shewn to have been done *at the same time*, a mere repetition of the same day, year, and place, would not be sufficient, for it would not expressly appear that the acts were done at the same time. So that an indictment averring that A. on such a day, at such a place, feloniously assaulted B. with intent to spoil her clothes, and that A. did, on the said day, at the said place, spoil the said clothes, is vicious, because it does not shew that the felonious assault and spoiling of the clothes were continuous (c).

In the case of homicide, the day of the stroke, as well as of the death, should be expressed; the former, because the escheat and forfeiture of lands relate to it, the latter, because it should appear that the death was within the day and year after the stroke (d).

Where the time is material, as of the death, in case of homicide (e), or where the time for prosecution is limited, as under the stat. 7 W. 3. c. 3. which enacts, that no prosecution shall be had for certain treasons therein mentioned, unless the bill of indictment be found within three years after the offence committed; the time, as averred in the indictment, should appear to be within the limit; but it is not necessary expressly to aver that the death happened, or that the offence was committed, within the temporal limit (f).

In general it seems that an uncertainty in the day or year, will vitiate the indictment.

A. was indicted for that on the 1st & 2nd days of May, he made an assault upon B. and a certain cloak of the said B. then and there found, feloniously took, &c.

(c) Williams's case, Leach, 597. under the st. 6 G. 1. c. 22. (e) 2 Haw. c. 23. s. 90. 2 Hale, 179, 186.

(d) 2 Hale, 179.

(f) 5 East, 259.

and the indictment was holden to be vicious, because two days had been before mentioned (*g*). So an indictment for the killing of B. on the feast of St. Peter, is bad, since there are two feast days of St. Peter, each of which is distinguished by an addition (*h*).

So if an indictment lay the offence to have been committed on an (*i*) impossible day, as if it lay it on a future day (*k*), or lay one and the same offence on different days (*l*), or on such a day as makes the indictment repugnant (*m*) to itself, it is void, and no defect of this nature can be aided by verdict.

The word *until* is capable of either an exclusive or inclusive sense: in the case of the *King v. Stephens and Agnew*, the information alleged, that the defendants held certain offices in the service of the East India Company, from, &c. *until* the 29th of November, 1795, and afterwards charged that each of the defendants, *whilst he held and exercised the said office* as aforesaid, did, to wit, on the 29th of November, 1795, receive a certain present, &c. And it was holden upon motion in arrest of judgment, that the word *until* was capable of an inclusive meaning, and that it appeared from the context to have been intended in that sense (*n*).

(*g*) 2 Hale, 178.

(*h*) Ibid.

(*i*) *Moor*, 555. *R. v. Fearfully*, 1 T. R. 316. 2 Haw. c. 25. s. 77.

(*k*) 2 Haw. c. 25, s. 77. *Rastal*, 263.

(*l*) 2 Haw. c. 25. s. 77. 2 H. 7. 7.

(*m*) 2 Haw. c. 25. s. 77.

(*n*) 5 East, 244. See also

the stat. 40 G. 3. c. 50. which enacts, that persons entering any forest, &c. in the night, i. e. between the hours of eight at night and six in the morning, from the first of October to the first of February, or between the hours of ten at night and four in the morning, from the first of February to the first of October, having

But though time must always be alleged in pleading (o) every material fact, it is never necessary to prove the allegation, unless time be a material ingredient in the offence. So that an overt act of treason may be proved to have been committed on a day different from that laid in the indictment (p):

And therefore upon a second indictment, the defendant may, by proper averments, shew that he has been already acquitted of that offence upon the first, though the two indictments allege the offence to have been committed on different days; for it would be hard indeed if the prosecutor might vary from the day laid in the indictment for the purpose of conviction, and the prisoner could not do the same in order to shew a previous acquittal (q).

## II. *Averment of Place.*

The necessity of shewing that the offence was committed within the local jurisdiction of those who have

any gun, &c. to kill game, &c. shall be deemed rogues and vagabonds, &c.

It clearly was not the intention of the legislature to exempt persons committing those acts on the 1st of Feb. and on the 1st of Oct. and therefore either *to* or *from* must have been used inclusively; it must however, be acknowledged, that this enactment is loosely penned. So the word *to*, when applied to time, may have either an *inclusive* or *exclusive* signification. Per *Ld. Ellenborough*, 5 *East*, 255, citing *Hale. Hist.* 165. *Ayliffe's Parergon*, 152. In *Nicholls v. Ramsel*, 2

*Mod.* 280, it was holden, that a release of all trespasses *usque ad* the 24th of April, did not include that day. And a bond dated the 26th of April, is not released by a release of all demands till the 26th. *Newman v. Beamond*, *Owen*, 50. See *R. v. Navestock*, *Burr. S. C.* 719. (o) 5 *T. R.* 620. *R. v. Holland*.

(p) *Foster*, 8. See also *Lord Balmerino's case*, 9 *St. Tr.* 587. 3 *Ins.* 230. *Syer's case*, *Keb.* 16. 1 *Hale*, 361. 2 *Hale*, 179, 291. 2 *Ins.* 318. 5 *T. R.* 620.

(q) 2 *Ins.* 318. 2 *Hale*, 179. 3 *Ins.* 230.

power to inquire, has already been considered; and it is essential to shew that every material fact, which is issuable and triable, was done at some particular vill (*q*), or hamlet, or place, within the county or other division (*r*), not only for the sake of shewing the authority to inquire, but also for the purpose of procuring a jury to be returned from the neighbourhood (*s*).

In appeals of death, the statute of Gloucester directs, that the offence shall be laid within the proper vill; but since the statute is directory, it does not seem to be absolutely essential to lay it within a vill (*t*).

In other cases a material fact may be laid at any place, from the visne or neighbourhood of which a jury can be returned.

A venire may be awarded to any place which is of so limited a compass, that all who live in and near it, may reasonably be presumed to have some knowledge of the persons resident, and facts done, within its limits (*u*).

(*q*) Bac. Ab. Ind. 562.  
2 Hale. 180.

(*r*) Chap. 1. and see Wigge's case, 4 Co. 45. where an indictment, before the coroner of the household, &c. was quashed, because it laid the stroke and the death at S. in the county of Middlesex, without alleging that S. was within the verge, i. e. within 12 miles of the lodging of the king, in his court.

(*s*) 5 T. R. 620.

(*t*) St. of Glou. c. 9. 2 Haw. c. 23. s. 92.

(*u*) Ibid. A visne may come from a town, 2 Haw. c. 23. s. 92. a ward, Yelv. 159.

1 Sid. 178. Cro. J. 222. parish, 6 Co. 14. Burr. 333. hamlet, 2 Haw. c. 23. s. 92. 6 Co. 14. burgh, Cro. Eliz. 866. manor, Co. Litt. 125. 1 Sid. 226. castle, 2 R. Ab. 612, 613, 614. Co. Litt. 125. forest, Co. Litt. 125. 2 Roll. Ab. 618. or any place known out of a town. 2 Ins. 319. Cro. Eliz. 200. And if the sheriff returned that there was no such vill or parish, then the practice was to award the venire *de corpore comitatus*, So a visne may come *de vicineto civitatis*, 2 Haw. c. 23. s. 92. 2 Roll. Ab. 622, 623. Cro. J. 307, 308.

Whenever the place is generally alleged, the law will intend it to be a vill, unless the contrary appear upon the record (x). If, therefore, a fact done in a vill, within a parish which contains several vills, be alleged to have been done at the parish generally, it will be intended, that the parish contains but one vill; and therefore to take advantage of the defect, the defendant must plead in abatement (y).

If there be no such vill or place within the county, the defendant may plead in abatement (z); but the indictment or appeal in such case is void, and so is all process founded upon it, by the express provision of the stat. 7 H. 5. 9 H. 5. c. 1. and 18 H. 6. c. 12.

It must be shewn that the vill or place is within the county (a).

But if the place be alleged in the body of the indictment, without the county, the indictment will still be

2 Hale, 252. But not from London, both on account of its great extent and because it has been the constant practice to shew the *parish* and *ward*, 2 Haw. c. 23. s. 92.; and the offence may be laid in a parish without the ward. But it should be laid either in a parish or in a ward, 7 H. 6. 36. Burr. 333. 9 Co. 66. 2 Haw. c. 25. s. 83. Harris's case, Leach, 928. In this last case judgment was arrested, because the offence was alleged to have been committed at the Guildhall of the city of London.

So a *visne* cannot come from a *liberty*, for it is a thing incorporeal, and not a place. 1 Sid. 326.; nor from the *scite* of a manor, because it does not signify a place but the limits of a place, 2 Roll. Ab. 618.; nor from a *weald*, 1 Sid. 88. 2 Roll. Ab. 617. *tamen qu.* and *vide* 2 Haw. c. 23. s. 93.

(x) Salk. 59. 1 Inst. 125. b. 2 Haw. c. 23. s. 92. Burr. 333.

(y) 2 Haw. c. 23. s. 92. Salk. 69.

(z) 2 Haw. c. 23. s. 92. Cro. Eliz. 200, 35.

(a) 2 Hale, 180. Co. 84.



good, if the place be referred to the county in the margent by the words, "in the county aforesaid (b)."

In civil pleadings, the place laid in the body of the declaration will be referred to the county laid in the margent, without the aid of any particular words; but in indictments it is otherwise, and a mere allegation of the place, without reference to a county previously mentioned, either in the indictment or the margent, will be vicious (c).

If the offence be laid to have been committed in a city which is a county of itself, but the jurisdiction of the latter is not co-extensive with the former, the offence should be laid within both (d).

It is a general rule, that a defective venue is not aided by verdict, and may be excepted to on demurrer, or by motion in arrest of judgment (e). And any uncertainty in the place or county, will avoid the indictment, as if an act be laid at such place, in *comitatu prædicto*, two counties having been mentioned before (f). And the case is the same, though one of the counties be mentioned in the margent only (g).

So where the defendant is described as late of W. and the offence is laid in the parish aforesaid (h).

So where the offence is laid at the town aforesaid, no town having been previously mentioned (i).

In an indictment, though it is unnecessary to aver a

(b) Com. Dig. Ind. G. 2. (e) 1 Roll. Ab. 781. 5 T. R. 162.  
2 Hale, 180. 3 P. Wms. 439.

(c) 3 P. Wms. 439. 2 Hale, 165, 166. 2 Haw. c. 25. s. 128. (f) 2 Hale, 180. Wingfield's case, Cro. Eliz. 739.

Cro. Eliz. 137. Lenthal's case, (g) Cro. Eliz. 739. 2 Hale, 180. aliter in civil cases. 3 Wils. 101, 184, 618. 6 Sid. 345. 3 340.

Wils. 340.

(h) 5 T. R. 162.

(d) R. v. Bruce, Andr. 62.

(i) 2 Haw. c. 25. s. 83. Cro. Car. 465.

mere conclusion of law with either time or place, yet if it be averred with time and place, and improperly, the indictment will be defective.

If, therefore, the stroke be laid at A. and the death at B. the indictment averring, in conclusion, that the defendant feloniously murdered the said C. D. at A. is vicious, for the murder was completed at B. by the death of the party there (*k*).

The words *from* and *unto*, when applied to place, are construed in an exclusive sense (*l*). Thus, *from* Hatley *unto* (*m*) Gamlingay, has been holden to exclude Gamlingay; so the words *to* and *from* the town of Battel (*n*), were holden to exclude Battel itself.

But though the place must be precisely laid in the indictment, it is not necessary to prove the offence to have been committed there; but it is sufficient to shew by evidence, that it was committed at any other place in the same county; and it is, in general, unnecessary to prove an offence to have been committed in any particular place, unless the place itself be of the essence of the crime, as in an indictment for striking in a church yard, or in indictments where the situation of a house or road is specially described, as in an indictment for burglary or for the non-repair of an highway (*o*), or for a nuisance near an high road and dwelling-house (*p*).

The rules relating to the averment of time, apply, for the most part, to the averment of place; and where the time must be repeated upon the allegation of subsequent acts, the repetition of place is generally also necessary (*q*).

(*k*) 2 Haw. c. 25.

(*l*) 2 Roll. Ab. 81.

(*m*) Leach, 596. R. v. Gamlingay, 3 T. R. 513.

(*n*) Burr. 376. Leach, 597.

(*o*) See tit. description of persons and things connected with the offence.

(*p*) R. v. White, Burr. 333.

(*q*) 2 Hale, 180. per Baller, J. 5 T. R. 629.

The allegation of any personal disqualification, necessary to bring the defendant within the purview of a penal statute, need not, in general, be pleaded with either time or place. Thus, under the statute which made it treason for a person born within the realm and in popish orders, to remain here, it has been holden, that the indictment need not shew any venue (*r*) for the birth or denization. So under the stat. 1 J. 1. c 7. in averring that the wife was living at the time of attempting to contract the second marriage, it is sufficient to allege that she was *then* living (*s*), without laying any venue. So in barretry a venue is unnecessary, for the offence is not confined to any particular place, and the offender is to be tried by a jury *de corpore comitatus* (*t*). And, in general, where the offence consists in a bare nonfeasance, it need not be alleged to have been committed any where, as where the defendant is indicted for not coming to church (*u*).

(*r*) 2 Haw. c. 25. s. 84. 112.

(*t*) 2 Hale, 180<sup>r</sup> Qu. and

(*s*) I have heard the objection taken twice and as often overruled.

see Mann's case, 3 Car. B. R.

(*u*) And. 139. Hob. 251.

2 Leon. 167. 1 Haw. c. 10. s. 5.

## CHAP. V.

*Of the substantial Description of the Offence in the Body of the Indictment.*

THE general rule has long been established, that no person can be indicted but for some specific act or omission, or punished, unless such act or omission be charged in apt and technical terms, with precision and certainty on the face of the record. Before this important part of the subject is resolved into its elementary divisions, it may be proper, briefly, to notice the principal reasons, on the ground of which the law exacts a certain and particular description of the offence, for these, it is evident, supply the true test by which the sufficiency of any criminal charge is to be ascertained.

It is necessary then to specify, on the face of the indictment, the criminal nature and degree of the offence, which are conclusions of law from the facts; and also the particular facts and circumstances which render the defendant guilty of that offence.

1st. In order to *identify* the charge, least the grand jury should find a bill for one offence, and the defendant be put upon his trial, in chief, for another, without any authority. And this is further necessary (a) :

2ndly. That the defendant's conviction or acquittal may enure to his subsequent protection, should he be again questioned on the same grounds; the offence, therefore, should be defined by such circumstances as will, in such case, enable him to plead a previous conviction or acquittal of the *same offence* (b).

3rdly. To warrant the court in granting or refusing

(a) Staunf. 181.

(b) Ib.

any particular right or indulgence which the defendant claims as incident to the nature of the case (c).

4thly. To enable the defendant to prepare for his defence (d) in particular cases, and to plead in all (e), or if he prefer it, to submit to the court by demurrer, whether the facts alleged, (supposing them to be true,) so support the conclusion in law, as to render it necessary for him to make any answer to the charge.

5thly: Finally and chiefly, to enable the court looking at the record after conviction, to decide whether the facts charged, are sufficient to support a conviction of the particular crime (f), and to warrant their judgment; and also, in some instances, to guide them in the infliction of a proportionate measure of punishment upon the offender (g).

Many instances are to be found in the older reports, of indictments, which have been supported, though they charged the defendants, in general terms, with being *heretics, traitors, insidiatores viarum et depopulatores agrorum* (h). For the *insidiatio viarum* and *depopulatio agrorum*, were considered as hostile acts; and the offenders convicted upon such indictments, were, for that reason, denied the benefit of clergy, notwithstanding the stat. 25 E. 3. c. 4. *pro clero* (i). But upon complaint made by the clergy, the stat. 4 H. 4. c. 2. was made, which enacts, "that these words shall no more be put into indictments, nor if they be, shall have such effect as to take from the prisoners indicted the benefit of clergy."

But notwithstanding particular instances to the con-

(c) Staunf. 181.

(g) Ibid. 5 T. R. 623.

(d) R. v. Holland, 5 T. R. 623. Fost. 194.

(h) 3 Ins. 41. 11 Co. 19. 2 Haw. c. 25. s. 59. 1 Hale,

(e) 3 Ins. 41.

571. 2 Hale, 333.

(f) Cowp. 672.

(i) 2 Hale, 333.

trary, such loose and general pleading seems to have been at all times inconsistent with the general policy and true spirit of the common law; and, in very early times, exceptions, upon this ground, were both taken and allowed. Thus, in the reign of Edward III. indictments, which charged the defendants, generally, with being common misfeasors, or common thieves, without shewing the particulars, were holden to be insufficient (*k*). So, indictments have been holden to be defective, which barely charged the defendant with being a common defamer, vexer, and oppressor (*l*), a common disturber of the public peace (*m*), a common deceiver (*n*), a common forestaller (*o*).

The only instances in which general pleading seems to be allowable, are exceptions, from the necessity of the case, where the offence is made up of a number of minute acts, which cannot be enumerated upon the record, without great prolixity and the danger of variance (*p*).

Thus, in an indictment against a common scold, it is sufficient to aver that she is a *common scold*; and in an indictment for barrettry, it may be averred, generally, that the defendant is a *common barretor* (*q*).

So, according to Lord Hale, an indictment, charging the defendant to be *noctivagus*, is good (*r*).

With respect to the degree of certainty and minuteness, in averring the facts and circumstances of any particular

(*k*) Staun. b. 2. c. 30.  
2 Hale, 182.

(*l*) 1 Roll. 79. Str. 699.

(*m*) 2 Haw. c. 25. s. 59.

(*n*) 6 Mod. 11.

(*o*) 2 Haw. c. 25. s. 59.

(*p*) 2 Haw. c. 25. s. 59.  
6 Mod. 311. Str. 1246. 2 Burr.

1233.

(*q*) But it is usual for the prosecutor (before the trial) to give the defendant a written note of the particulars intended to be relied upon. 2 Haw. c. 25. s. 59.

(*r*) 2 Hale, 182.

offence, it may be proper to premise the following authorities. Lord Hale says (s), "An indictment is nothing else but a plain, brief, and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact, and its nature."

In the case of the King v. Horne (t), Lord Chief Justice De Grey, in delivering the opinion of the judges, observed, "The charge must contain such a description of the offence, that the defendant may know what crime it is which he is called upon to answer, that the jury may appear to be warranted in their conclusion of guilty, or not guilty, upon the premises delivered to them, and that the court may see such a definite crime, that they may apply the punishment which the law prescribes. This, I take to be what is meant by the different degrees of certainty mentioned in the books; and it consists of two parts; the *matter* to be charged, and the *manner* of charging it. As to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed must be set out, and all beyond are surplusage; and therefore, in the instance of a prosecution for perjury, it is necessary to set out the oath, as an oath taken in a judicial proceeding, and before proper persons, in order to see whether it is an oath which the court had jurisdiction to administer. In the prosecution of a constable, for not serving the office, it is necessary to set out the mode of his election; because, if he is not legally elected, he cannot be guilty of a crime in not serving the office. Where the circumstances go to constitute the crime, they must be set out. Where the crime, is a crime independently of such circumstances, they may aggravate, but do not contribute to make the offence."

(s) 2 Hale, 169.

(t) Cowp. 672.

***Substantial Description.—General Rules. 67***

In the case of the *King v. Hollond* (t), the court held that three things ought to concur in every criminal proceeding: 1st. That the party accused should be apprized of the charge he is to defend. 2dly. That the court may know what judgment is to be pronounced according to law. 3dly. That posterity may know what law is to be derived from the record. One count of the indictment, in the last case, alleged that the defendant, and other persons in office, "did not commence and prosecute the war against Tippoo Sultaun, with all possible vigour and decision;" and this count the court held to be vicious, because it did not sufficiently apprize the defendant of that which was intended to be proved against him.

In the case of the *King v. Stevens* (u) and Agnew, Lord Ellenborough, C. J. in delivering the judgment of the court, said, "every indictment, or information, ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy; and, except in particular cases, where precise technical expressions are required to be used, there is no rule that other words shall be employed, than such as are in ordinary use."

On the other hand, it is unnecessary, even in an indictment for treason, to detail the minutiae of those circumstances intended to be proved against the defendant. It is sufficient that the charge be reduced to a reasonable degree of certainty, so that the defendant may be apprized of the nature of it, and prepared to give an answer to it (x).

The substantial description of the offence, will be considered under the following divisions:

1. Of alleging the *nature and degree of the offence* against one or more.

(t) 5 T. R. 623.

(x) Fost. 194.

(u) 5 East, 258.



2. Of setting forth the *means and manner* of committing the offence, with the circumstances *immediately* connected therewith.

3. Of alleging circumstances *collateral* to the principal act, but which are essential to the offence.

4. Of alleging the defendant's *intention*.

5. Of the special description of *persons, places, and things*, connected with the offence, with names, quantity, number, and value.

## CHAP. VI.

*Of alleging the Nature and Degree of the Offence  
in technical Terms.*

I. *As against the Principal in the first Degree, p. 69.*

II. *Against Principals in the second Degree, p. 75.*

I. **THE** law distributes crimes into three great classes, —treasons, felonies, and misdemeanors inferior to felony. Each of these is attended with peculiar incidents, both before and after conviction. It is therefore one important office of an indictment to specify, in technical language, the particular genus of crime imputed to the defendant, that he may avail himself of those advantages which the law allows him, that he may be excluded from those which the law withholds, and that the court may be authorized, after conviction, to inflict the appropriate measure of punishment. This is done, by charging the treasonable act to have been committed *proditorie*, and the felonious act to have been done *felonice* (a); these words are absolutely essential to the description of these offences; and the intention to charge a bare misdemeanor, is ascertained by the omission of both the words descriptive of treason and felony; for it seems to be clear, that no offence, as described in any indictment, can amount to more than a misdemeanor (b), if it be not laid to have been committed either *proditorie* or *felonice* (c).

(a) Staunf. 96. a. 2 Haw. c. 25. s. 55. crime below the degree of felony.

(b) Note, the term *misdemeanor* is in general used to signify, in these pages, a (c) 2 Hale, 172. 2 Haw. c. 25. s. 55. 3 Ins. 15,

Next, in the description of the species of treason, felony, or misdemeanor, charged upon the defendant, it is frequently necessary to make use of technical and appropriate words, which are either generally descriptive of the offence itself, or of the particular facts connected with it. A strict adherence to such words, may, in some cases, appear too nice and critical to serve the ends of justice; yet it seems founded upon many strong and substantial reasons.

For instance, by successive decisions, the legal value and weight of a term or phrase of art is ascertained; and, should a doubt arise as to its meaning, reference for the purpose of removing it, may be had to former authorities, whilst every new expression would introduce fresh uncertainty, and the benefit to be derived from precedent would be wholly lost.

In all indictments for treason, the offence must be laid to have been committed *traitorously*. But if the treason itself be laid to have been so committed, whether it consist in compassing and imagining the king's death, or otherwise, it is not necessary to allege every overt act to have been traitorously committed (*d*). In the case of *treason* against the king's person, the indictment, in conclusion, should allege the offence to have been committed against the defendant's duty of *natural allegiance*, if he be a natural born subject, or simply against his duty of allegiance, if he be an alien; but the word *natural*, does not appear to be essential in the first instance, and would probably be fatal in the latter, if it turned out that the defendant was an alien (*e*).

(*d*) Cranbourn's case, 4 St. 1 Hale, 59. 77. 92. Dyer, 145. Tr. 701. Salk. 633. East, P. C. Calvin's case, 7 Co. 6. b. 1 116. Haw. c. 17. s. 5. 6 St. Tr. 53,

(*e*) Fost. 186. 4 St. Tr. Francia's case. 687, 9. Salk. 633. 4 Mod. 163.

In indictments for inferior treasons, such as relate to the coin, &c. it is usual to allege the offence to have been *feloniously* as well as *traitorously* committed; but this does not appear to be essential. So petit treason is usually alleged to have been *feloniously* as well as *traitorously* committed (*f*), and the indictment, in conclusion, alleges that the defendant did traitorously and feloniously kill and *murder*; in which case, the defendant, though acquitted of the treason, may nevertheless be convicted of the felony and murder (*g*).

It has already been observed, that every felony must be alleged to have been committed *feloniously*; and in indictments for particular felonies, technical and appropriate words are frequently essential to the description of the offence. Thus, in an indictment for murder, it is essential to state, as a conclusion from the facts previously averred, that the said defendant, him, the said C. D. in manner and form aforesaid, feloniously did kill and *murder*(*h*); a term of art, which can in no case be dispensed with. So it must also be alleged, that the offence was committed of the defendant's *malice aforethought*; words, which cannot be supplied by the aid of any other. And if any of these terms be omitted, or if the defendant be merely charged with killing and slaying the deceased, the offence will amount to no more than manslaughter (*i*). Where the death arises from any wounding, beating, or bruising,

(*f*) Fost. 329.

(*g*) Fost. 328.

(*h*) 1 Hale, 450. 466. 4 Bl. Comm. 307. Yel. 205.

(*i*) 1 Hale, 450. 466. East, P. C. 345. A killing by mis-

adventure, or chance medley, is described to have been done "casually and by misfortune, and against the will of the defendant."

it has been said, that the word *struck* (*i*) is essential, and that the wound, or bruise, must be alleged to have been *mortal*. And whatever doubt may rest upon the necessity of the first allegation, it would not be prudent, at all events, to omit it where it is applicable; and as to the second (*k*), it has been holden, that its omission cannot be supplied by the averment, which is in all cases necessary, that the party died of the stroke (*l*).

In appeals and indictments of mayhem, the words *feloniously*, and did *maim*, are essential (*m*).

In appeals and indictments of rape, the words *feloniously ravished* are essential, and the word *rapuit* is not supplied by the words *carnaliter cognovit* (*n*); and it seems that the latter words are also essential in indictments (*o*); though the contrary has been ruled in the case of an appeal (*p*).

The usual course, in an indictment for rape, is to aver that it was committed *against the will* of the female, and therefore it would not be safe to omit the averment. In an indictment for an unnatural crime, the descriptive words of the statute, taking (*q*) away clergy, must be used; and it is not sufficient to say *contra naturæ ordinem rem habuit veneream et carnaliter cognovit* (*r*).

In an indictment for *burglary*, the essential words are

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| ( <i>i</i> ) 2 Hale, 184. 1 Buls. 124. | ( <i>o</i> ) 1 Hale, 632. 3 Ins. 60.    |
| 2 Ins. 319. 2 Haw. c. 23. s. 82.       | Co. Lit. 137. 2 Ins. 180.               |
| Cro. J. 635. 5 Co. 122.                | ( <i>p</i> ) 11 H. 4. 13. 2 Haw. c. 23. |
| ( <i>k</i> ) Lad's case, Leach, 112.   | s. 79. Summ. 187. Staun. 81.            |
| ( <i>l</i> ) 2 Hale, 186. 1 Haw. c.    | ( <i>q</i> ) 5 Eliz. c. 17. 3 & 4 W.    |
| 23. s. 82. Kel. 125.                   | & M. c. 9. s. 2. Fost. 424. Co.         |
| ( <i>m</i> ) 3 Ins. 118. 2 Haw. c. 23. | Ent. 351. 3 Ins. 59. 1 Haw.             |
| s. 15. 16, &c. 2 Haw. c. 25.           | c. 4. s. 2.                             |
| s. 55.                                 | ( <i>r</i> ) East. P. C. 480. 3 Ins.    |
| ( <i>n</i> ) 1 Hale, 628. 2 Hale, 184. | 59.                                     |
| 1 Ins. 190. 2 Ins. 180.                |   |

*feloniously* and *burglariously* broke and entered the dwelling-house, in the *night time*; and the felony intended to be committed, or actually perpetrated, must also be stated in technical terms(*s*). So in case of simple larciny, the words *feloniously took and carried away the goods*(*t*), or *took and led away the cattle*, are essential.

In an indictment (*u*) for robbery from the person, the words *feloniously*, *violently* (*x*), and *against the will*, are essential; and it is usual, though it seems to be unnecessary, to allege a *putting in fear*. Piracy must be alleged to have been done *feloniously* and *piratically* (*y*).

So, in case of misdemeanors, technical words are frequently necessary.

Thus, a *common barretor*, and a *common scold*(*z*), must be charged as such; and in an indictment for maintenance, the word *manutenuit* should be inserted, and the word *riot* seems to be used in all indictments for that offence (*a*).

It has been said, that where the fact, laid in an indictment, appears to be unlawful, it is unnecessary to allege it to have been *unlawfully* done (*b*). In truth, the averment is in no case essential, unless it be part of the description of the offence, as defined by some statute; for if the fact, as stated, be illegal, it would be su-

(*s*) 1 Hale, 549.

(*t*) 1 Hale, 504. 2 Hale, 184.

And it has been said that for stealing an horse, it should be *cepit et abduxit*, for stealing sheep *cepit et effugavit*; but I find no decision which warrants these unprofitable distinctions.

(*u*) 1 Hale, 534. Fost. 128.  
3 Ins. 68.

(*x*) Qu. *et vide* Smith's case,

East's P. C. 783. in which it was holden, that *violenter* is not an essential term of art.

(*y*) 1 Haw. c. 37. s. 6. 10.

(*z*) Com. Dig. Ind. G. 6.  
Mod. Ca. 11.

(*a*) R. v. Johnson and others,  
Wils. 325.

(*b*) 2 Roll. Ab. 82.

perfluous to allege it to be unlawful; if the fact stated be legal, the word *illicite* cannot render it indictable; and the same observation is applicable to the terms wrongfully, unjustly, wickedly, wilfully, corruptly, to the evil example, falsely, maliciously, and such like; which are unnecessary, if they are not to be found in the very definition of the offence, either at common law, or in the purview of a statute, and at common law it seldom happens that one of these expressions may not be supplied by an equivalent one. \* Thus, though it is usual to allege that the party *falsely* forged and counterfeited, it is enough to allege that he forged, because the word implies a false making; and in indictments for libels, it is sufficient either to use the word *falsely* or *maliciously* (b), or an equivalent epithet.

When the indictment is framed upon the purview of some statute, it may be laid down as a general rule, that all the epithets of manner contained in the statute, should be (c) averred upon the record. In some instances, indeed, indictments have been holden to be sufficient which did not strictly pursue the words of the statute on which they were founded (d); but it is at all times imprudent to omit any part of the description contained in the statute, since such an omission will in general be fatal. Thus an indictment for perjury, under the statute of Elizabeth, for want of the word *wilful*, which is used in the act, was holden to be vicious (e), though in an indictment for perjury, at common law, the word would not be essential. The necessity of adhering strictly to the terms or phrases used by a penal statute, will hereafter be more

(b) Sty. 392. 2 Will. Saun. (d) Fost. 130. 1 And. 195, 242. R. v. Hall and Crutchfield,

(c) 2 Haw. c. 25. s. 110. East. P. C. 895, 896.

Kel. 8. Fost. 424.

(e) Leach, 82.

***Against Principals in the first Degree. 75***

fully considered; for the present it may suffice to observe that, in framing an indictment, it is in all cases prudent and advisable to make use of the same language which the legislature has thought fit to select and adopt.

In every indictment, whether technical words be essential or not, the act of the defendant must be directly and plainly, and singly charged; it is insufficient, therefore, to allege the offence, by way of recital, prefacing the description with the words, "for that whereas." (*f*) So to allege that A. discharged a gun at B. giving him a mortal wound, without directly averring that he struck B. has been holden to be insufficient (*g*). So it is improper to allege an offence in the disjunctive, as by averring that the defendant forged *or* caused to be forged, for the judgments are different (*h*); and the indictment would be defective, even though the judgments for the two offences, disjunctively stated, be the same; as if the indictment allege that the defendant *verberavit vel verberari causavit* (*i*); and the defect would be fatal, either upon demurrer, or upon motion in arrest of judgment (*k*).

2ndly. *Against principals in the second degree.*

Where several are concerned in the committing of the same crime, or in procuring it to be committed, they are either *principals* or *accessories before the fact*.

It will be considered here, how the offence ought to be charged against those whom the law considers to be *principals*.

In treason, petit larciny, and misdemeanors below fe-

( <i>f</i> ) 2 Haw. c. 25. s. 60. Salk. 371. 3 Mod. 53. Lord Ray. 1363. Burr. 400.	( <i>h</i> ) 5 Mod. 137. R. v. Stock- er, Salk. 342, 371. 8 Mod. 32. Str. 747, 900.
( <i>g</i> ) Long's case, 5 Co. 122. Buls. 124. <i>tamen qu. et vid.</i> Ld. Ray. 1169.	( <i>i</i> ) 5 Mod. 137. ( <i>k</i> ) See Index, tit. Defective Indict.



lony, the distinction between principals and accessories is not admitted; and all advisers, contrivers, and procurers, are equally principals with those who commit the offence, though they be absent at the time of its commission; and in such cases it seems to be a general rule, that all such principals may be charged to have committed the offence jointly, provided the nature of the offence admits of such participation (*l*). But where a person becomes a traitor, by harbouring and receiving another who has committed treason, the indictment must be specially framed for the receipt, and not for the principal treason (*m*).

And in general, where A. and B. are present, and A. commits an offence in which B. aids and assists him, the indictment may either allege the matter according to the fact, or charge them both as principals in the first degree (*n*), for the act of one is the act of the other (*o*). And upon such an indictment, B. who was present aiding and abetting, may be convicted, though A. is acquitted (*p*). So A. and B. if present aiding and abetting, may be convicted, though C., a person not named in the indictment, committed the act (*q*). Again, if an indictment for murder charge that A. gave the mortal stroke, and that B. was present aiding and abetting, both A. and B. may be convicted, though it turn out that B. struck the

(*l*) Vide supra, tit. Joinder.  
Where the offence procured to be committed is several in its nature, the procurer must be specially indicted for the subornation.

(*m*) Fost. 345.

(*n*) Fost. 351, 425. 2 Haw. c. 23. s. 76. 2 Hale, 344.

(*o*) 2 Haw. c. 23. s. 76. R. v. Young and others, 3 T. R. 105.

(*p*) Fost. 351. 1 Hale, 437, 463. 2 Hale, 185, 292, 344, 5. 2 Haw. c. 46. s. 39. 9 Co. 67.

(*q*) R. v. Borthwick, Doug. 207. Kel. 109. Saund. 109.

*Against Principals in the second Degree.* 77

blow, and that A. was present aiding and abetting (r). To go one step further, upon a similar indictment charging A. as a principal in the first degree, and B. as present aiding and abetting, B. may be convicted though A. be acquitted. This was expressly decided in the case of Wallis (s), who was tried before Lord Hale, C. J. who observed, "who actually did the murder is not material; the matter is, that a murder was committed, and the other is but a circumstance, and all are principals in this case; therefore if a murder be proved it is well enough."

In a much later case (t) the same point arose, and the majority of the judges were of opinion, that the conviction was proper; but it appears that the judges were not unanimous, and the prisoner was not executed.

If a statute oust a person who does a particular act of his clergy, and be silent as to aiders and abettors, the indictment will not oust an offender of his clergy unless it allege that he did the act; and it will be insufficient to describe him as being present aiding and abetting. Thus if an indictment under the statute of stabbing, allege that A. made the thrust, and that B. and C. were present aiding and abetting, if it turn out that A. gave not the stroke, but B. and that A. and C. were aiding and abetting, not only A. and C. who gave not the stroke, would have their clergy, but B. also; because though the case of B. is within the statute, yet as to him the indictment brings him *not within the statute* (u). "And therefore," says

(r) *Banson v. Offley*, 2 Show. 510. 3 Mod. 121. *Fost. Leach*. 398.

351. 1 Hale, 437, 463. 2 Hale, 344, 5. (u) 2 Hale, 344. Al. 43. Styles, 86. Salk. 542. 1 Hale,

(s) Salk. 334. 1 Haw. c. 31. 468. 2 *Ld. Ray*. 842. See the very learned and elaborate

Lord Hale, "the case differs from an indictment for murder, where, though it be laid that A. gave the stroke and that B. was present aiding and abetting, yet, if upon

argument of Mr. Justice Foster, in the case of Midwinter and Sims, Fost. 415. The prisoners were indicted on the stat. 9 G. 1. c. 22. for feloniously killing a mare. It appeared in evidence, that Sims held the mare by means of a girdle buckled round her neck, whilst Midwinter, with a large sharp hook, called a bill, inflicted a deep wound in her belly, of which she died. The doubt was, whether the words of the act, "if any person shall unlawfully and maliciously kill, &c. any cattle, &c. every person so offending, being thereof lawfully convicted, shall be adjudged to be guilty of felony, and shall suffer death without benefit of clergy," ousted Sims of his clergy. Upon the first consideration of this case, Lord C. Baron Parker and Mr. J. Burnet were of opinion, that the prisoner was ousted; Mr. J. Foster differed from them, and Justices Wright and Denison inclined to the opinion of Mr. J. Foster; but they afterwards

agreed with the Chief Baron and Mr. J. Burnet, and the same construction of the statute was adopted by the judges in the coalheavers' case, Leach, 76. Mr. Justice Foster's main argument is derived from a supposed analogy of the case to those under the stabbing act, 11. 43. Styles, 86. of secret larciny from the person, 1 Hale, 529. and of robbing in a dwelling house, under the st. 39 Eliz. c. 15. R. v. Evans and Finch, Cro. Car. 473. 1 Hale, 526, 528, 537; in all of which cases it had been decided, that a mere aider and abetter, who did not come within the express words of the statute, was not ousted of his clergy. But, with great veneration for the talents of so distinguished a proficient in criminal law, I venture to observe, that in those cases the plain literal construction of the several acts was adhered to, and not violated, by confining their operation to principals in the first degree, to the exclusion of *aiders and abettors*; but it

*Against Principals in the second Degree.* 79

evidence it appear that B. gave the stroke, and A. was abetting, both shall be convict of murder; for both are equally murderers, and the indictment is true as to both;

seems impossible to conceive, by what rule of construction the descriptive words of this or any statute can apply to an aider and abetter for one purpose and not for another, that is, so far as to render him a principal felon, and yet not so far as to subject him to the punishment in the same breath denounced against such a felon. For it was admitted on all hands, *that an aider and abettor was a principal felon under the act.* And it would introduce a most mischievous degree of subtlety into legal construction, so to interpret the legislative definition of an offence, as to hold that a person falling within that description, should not be subject to the penalty of the statute; on the other hand, it is no strained argument to suppose that the legislature, in framing the statute, considered, that by the operation of the common rule of construction, an aider and abetter would be treated as a principal offender, and conse-

quently intended by such words to subject him to the penalties of the statute.

Mr. Serjeant Hawkins, b. 2. c. 33. s. 98. complains of the decision in the case of Evans and Finch, Cro. Car. 473. under 39 Eliz. c. 15. in which it was holden, that he who stands by and abets another whilst he breaks and enters the house, and does not *enter himself*, is not within the statute, which ousts of his clergy, *any person who shall be convicted of a felonious taking in a dwelling house.* And to shew that this decision is incorrect, he supposes this case; A. and B. *both enter* the house; A. takes the money and shares it with B. after both have left the house. Mr. Serjeant Hawkins then proceeds to assert, that both A. and B. would be guilty within the act, and thence infers that both are guilty in the principal case. But this mode of reasoning is remarkable. The statute ousts of clergy him who takes in the dwelling house; and, from a sup-

viz. that of their malice aforethought they did kill and murder." But it has been decided, that where a statute creates a new felony, enacting, that all who are guilty of the thing prohibited by it shall be adjudged felons, without benefit of clergy, by necessary implication it makes all the procurers and abettors of it accessories or principals, upon the same circumstances which will make them such in a felony by the common law, and there-

posed case, where two persons enter the dwelling house, it is inferred that one would have been ousted of his clergy, had he remained on the outside. He is equally guilty of the larceny, it is true, whether he enter or not; but, unless he enter, he does not fall within the words of the statute. At the Old Bailey Sessions, June, 1813, upon the trial of Brady and others, for forging and uttering a check, Mr. Baron Graham said, "it has frequently been held, that what would amount to a constructive presence at common law, will not be sufficient upon an indictment under a statute. A case under this statute occurred before me at Derby. Two persons went in concert to utter a forged note; one went into a shop to utter it, whilst the other remained at some little distance in the street; it was objected that the latter was not liable as a

principal. I saved the point, and the judges were of opinion that the utterer only was liable."

It seems very doubtful whether the legislature, in framing the stabbing act, ever intended it to apply to a person aiding and abetting; for the main intention was to ensure the punishment of murderers in particular cases, where malice prepense could not be easily proved, except from the means of destruction used, 1 Hale, 456, Foster, 298. 1 Kel. 55.; but the inciting and assisting of another to stab a third person, is such an unequivocal act of malice, as to render the aid of the statute unnecessary; yet Mr. Serjeant Hawkins observes, that the cruelty and bloody mind of him who gives the stab, is peculiar to himself, 12 Haw. c. 23. s. 98, and in that way explains the exemption of principals in the second degree.

fore makes all, who are present aiding and abetting, principals in the second degree (x).

But it seems advisable, in such cases, to describe the abettor as a principal in the first degree; for at all events any objection to the indictment itself is by this means avoided; and if the penal clause includes an aider and abettor, though not named, it includes him as a principal by construction of law, and he is properly described as such; and if the clause does not extend to an aider and abettor, he cannot be made liable by the form, in which he is charged.

If one maliciously aid and abet another who strikes the blow, they may be charged in the same indictment with different degrees of homicide,—the abettor with murder, the party who struck with manslaughter (y). But if the bill charge two with murder, and the jury find it only manslaughter in one, a new bill for that offence should be preferred against him (z).

*As to the form of charging defendants as aiders and abettors.*

After alleging the offence of the principal with its circumstances, the indictment may allege generally, that E. F. &c. was present, aiding and abetting at the felony and murder (as the case is) committed in manner and form aforesaid (a).

And the averment that the party was present aiding and abetting, cannot be supplied by any argument, implication, or intendment (b). A person may indeed be an abettor to a felony, though he be not actually present: for

(x) *The Coalheavers' case*,  
Leach, 76. *R. v. Midwinter*  
and Sims, Leach, 78, in the  
notes. *Fest.* 416. 2 *Haw. c.* 33.  
s. 98.

(y) 2 *Haw. c.* 29. s. 7.

(z) 2 *Hale*, 162. 2 *Roll. R.*  
408. 1 *Sid.* 230. 3 *Bula*, 306.

(a) 4 *Co.* 42. *Heydon's case*.

(b) 4 *Co.* 42.

if several set out together, or in small parties, upon one common design, whether of murder, or felony, or for any other unlawful purpose, and each takes the part assigned to him,—some to commit the fact, and others to watch, &c. they are all, provided the fact be committed, in the eye of the law present at it (c).

But without attempting to define what does in law amount to such a presence as will constitute the party an abettor, suffice it to observe, that in all cases where a person is either actually or constructively present, aiding and abetting in the commission of a felony, his offence may be averred by the general words already mentioned. In indictments for homicide, it is safer to allege the abetment generally; but if it be laid specially, it should be applied to the stroke, and not to the death (d). And it seems proper in such case to aver, that the principal and abettors jointly made the felonious assault of malice prepense; and to aver, in conclusion, that they all murdered the deceased (e). But where the stroke and death are on different days, it would be repugnant to allege, that the party was present aiding and abetting at the felony and murder the first day; because the felony was not complete before the death, and a man cannot be made a felon by a fictitious relation of his act to the time of the stroke (f).

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|---|---|
| (c) Fost. 350.  | the stroke. 4 Co. 42. 2 Ins.  |
| (d) 4 Co. 42. 2 Haw. c. 29. s. 17.  | 320. Staunf. 63. contra. But if a man, <i>non compos</i> , strike himself, and afterwards become sane, and die of the blow, he shall forfeit nothing; for the death shall have relation to the stroke. 22 E. 3. Corone, 244. 3 Ins. 54. 4 Co. 43. 2 Ins. 318. |
| (e) See the Ind. Mackally's case, 9 Co. 62.   |   |
| (f) Heydon's case, 4 Co. 42. And therefore the year, within which an appeal must be brought, is to be computed from the death, and not from |   |

## CHAP. VII.

*Of setting forth the Means and Manner of committing the Offence, with the Circumstances immediately connected therewith.*

- I. *Forcible Means, &c.*
- II. *Fraudulent Means, &c.*
- III. *Illegal Solicitations, Attempts, and Endeavours.*
- IV. *Misconduct in Office, Extortions, &c.*
- V. *Illegal Combinations and Conspiracies.*

WHERE the particular means, which are used to effect a criminal object, are essential to the constitution of the offence, it seems to be a general rule, that such means must be described on the record, to enable the court to see that the jury have formed their conclusion upon proper premises. In an indictment, therefore, for obtaining money by false pretences, it is necessary to specify the pretences, that they may judicially appear to have been such as fall within the purview of the statute. And the same reason applies to all indictments for publishing libels, or uttering profane and blasphemous or seditious words, for forgery, perjury, and the sending of threatening letters. For in all these cases, and many others, matters of fact are so mixed up with questions of law, as to render it necessary to describe the means and manner of committing the offence upon the record, in order to subject them to judicial examination.

There is besides a degree of particularity and precision, which is called for in the description of the offence,



for the purpose of informing the defendant what is intended to be proved against him, and of so identifying the charge, that an acquittal or conviction may enure to his subsequent protection.

In this chapter, then, it is proposed to examine with some minuteness, in what cases, and with what degree of precision, it is necessary to allege the *means* and *manner* of offending; and with this view, and for the sake of preserving as much connection as so extensive a subject admits of, instances will be selected, which range themselves within the following classes:

The *first* comprising offences committed by *forcible* means, such as murder, burglary, and larcinies of every description.

The *second*, offences committed by *fraudulent* means, including forgery, perjury, and other indictable frauds.

The *third*, all procurements by illegal *solicitation*, &c. as by accessories before the fact, &c.; and also offences resting in tendency, whether they consist in bare solicitation, in the publication of libels, in the speaking of blasphemous or seditious words, (which may not improperly be considered in the light of solicitations,) or in any other criminal *attempt* or *endeavour*.

The *fourth*, all offences consisting of misconduct in office, as by the extortion of money, &c.; and, as analogous to these, the sending of threatening letters, and the extortion of money, by threats of legal process.

The *fifth*, illegal *combinations* and conspiracies.

1. *Offences committed by FORCIBLE means.*

It is still usual, in indictments for forcible injuries, to make use of the technical words, *vi et armis*, but by the stat. 37 H. 8. c. 8. it is enacted, that "inquisitions, or indictments, lacking the words *vi et armis*, *viz. baculis cuttellis arcubus et sagittis*, or any such-like words, shall be taken, deemed, and adjudged, to all intents and pur-

poses, to be as good and effectual in law, as the same inquiries and indictments, having the same words, were theretofore taken, deemed, and adjudged to be." These words are, therefore, clearly superfluous (z), even where the crime is of a forcible nature, and were unnecessary at common law, where the injury was not forcible (a).

The description of an injury to the person, is usually prefaced by an averment, that the defendant, "in and upon A. B. made an assault;" and where the offence amounts to felony, the indictment should aver, that the *assault was feloniously made*, and will be defective if the averment be omitted (b).

In appeals and indictments of homicide, a great degree of minuteness has ever been held essential to the description of the instrument and means by which the crime was perpetrated, although great latitude has been permitted in departing from such a description in evidence.

Thus, it is usual to state the particular weapon with which the mortal blow was inflicted, or the species of poison which was administered; but evidence may be given of a blow inflicted by a different instrument, or, that the death was effected by means of a different species of poison (c), provided the nature and kind of destruction proved, agree in substance with that alleged. Thus, if the wound be stated to have been inflicted with a dagger, it will be satisfied by proof of a striking with a sword, rapier, staff, or bill (d), for they produce

(z) 2 Lev. 221. Cro. J. 1 Hale, 594. 3 Ins. 68. Pulton, 473. 3 P. Wms. 497. 131. b.

(a) Skinner, 426. 2 Haw. (b) R. v. Delfayman and c. 25. s. 90. And in case Randall, Leach, 84. of murder, the force at common law is implied from the very nature of the offence. (c) 3 Ins. 50. Mackelly's case, 9 Co. 67. (d) 9 Co. 67. 2 Hale, 187. 1 Haw. c. 34. s. 3.

the same kind of mischief; and it is said, that the word *struck*, is the essential term (*e*), whence it should seem that if the death be proved to have ensued from a *striking*, a variance from the instrument alleged will be immaterial. But evidence cannot be given of a species of death, totally different from that specified; therefore, if it be alleged to have been effected by striking, it cannot be proved by evidence of poisoning, strangling, or starving (*f*). It is usual also to allege the manner in which the weapon was held, as, that it was held in the defendant's right hand, or in both his hands, and to state its value; but these averments do not seem to be material (*g*). It is necessary, to set forth a description of the wound, (or other mischief effected by the stroke,) the part of the body (*h*) in which it was inflicted, and its dimensions, with great certainty. Thus it has been holden to be insufficient, to allege that the wound was given about the breast (*i*), or about the navel (*k*), or on the arm, or side, without saying, which arm or side (*l*); but, if the wound be once well described, a subsequent imperfect description will not vitiate the indictment; as, if the wound be alleged to have been given on the left side of the belly, about the navel; for the first part of the description is certain, though the latter is uncertain (*m*). The dimensions of the wound must be described, its length and depth (*n*). But it is sufficient to allege, according to the real circumstances of the case: as, that the defendant struck a mortal blow, on such a part of the body, or

(*e*) Cro. J. 635. Palm. 282.      (*i*) Young's case, 4 Co. 40.  
5 Co. 122. 2 Hale, 185. 1 Buls.      2 Hale, 181.

124.

(*k*) Walker's case, 4 Co. 41.

(*f*) Hale, 291.

(*l*) 2 Hale, 185. Webster's

(*g*) 2 Hale, 285. 2 Haw. c. case, 31 Eliz. 5 Co. 131. Sty. 76.

23. s. 79, 80.

(*m*) Walker's case, 4 Co. 41.

(*h*) 4 Co. 40. 2 Haw. c. 23.

(*n*) 2 Hale, 186. 2 Haw. c.

s. 80.

23. s. 81.

gave him, in such a part, a mortal wound, penetrating into, and through his body (*o*).

Where several blows have been given, or different kinds of poison have been administered, it may be averred, that if the party did not die of the one, he did of the other (*p*); or, it may be alleged, generally, that he died of the said several blows, so struck, or of the poisons so administered (*q*). The reason for requiring the means to be set out with such particularity, seems to have been, that the court might see that the wound was serious enough to occasion death.

It must be averred, that the wound, or bruise, was mortal (*r*); and finally, the adequacy of the means to produce death must be further shewn, by a direct averment, that the party died of the stroke, or poisoning, and this cannot be supplied by any implication or intentment whatsoever (*s*).

In an indictment for burglary, it is unnecessary to state the particular means of breaking and entering; it is sufficient to allege generally, that the defendant broke and entered (*t*).

In case of robbery from the person, it is not necessary to state the particular means by which the prosecutor was induced to yield up his property, or to state any particular threats or violence, or even to allege, that he was put in fear; it may in all cases be alleged, generally, that the offence was done *violenter et contra voluntatem* (*u*).

In an indictment for simple larciny, it is unnecessary to set forth the particular means or contrivance (*x*) made

(*o*) East. P. C. 342.

(*t*) 1 Hale, 549.

(*p*) Young's case, 4 Co. 40.

(*u*) 1 Hale, 534. Fost. 128.

(*q*) Weston's case, 3 Ins. 50.

(*x*) 1 Hale, 504. 2 Hale,

(*r*) Lad's case, Leach, 112. 184.

(*s*) 2 Hale, 186. 1 Haw,

c. 23. s. 82, 83. Kel. 125.

882 INDICTMENT.—*Means and Manner.*

use of, to gain possession of the property, or to remove it; but the indictment alleges generally, that the defendant feloniously stole, took, and carried away the goods.

In the description of inferior injuries to the person, such as battery, it is unnecessary to state the particular means by which the bodily harm was effected; it seems sufficient to allege, that the defendant did beat, strike, wound, &c. and to aver the damage thereby done to the person assaulted.

An indictment for a forcible entry, at common law, must charge the defendants with having used such a degree of force, as amounts to a breach of the peace (s). But it is sufficient, in such an indictment, to aver, that the defendants unlawfully, and *with a strong hand*, entered the prosecutor's mill, &c. and expelled him from, the possession thereof (t).

II. *Offences committed by FRAUDULENT means.*

It seems to be an universal rule, that in the description of all crimes founded in fraud, the *instrument, or means of fraud, must be specified.*

And this is necessary, because every fraud is not an indictable offence; thus, at common law, a man who obtains money by a mere naked lie, is not criminally (u), though he may be civilly responsible; whether particular circumstances constitute an indictable fraud, is a question of law; and therefore, according to a fundamental rule of description in indictments, such circumstances must be set out, in order to shew that the facts amount to an indictable offence. Hence, an indictment for cheating, at common law, cannot be maintained, unless some specific false token be alleged to have been used (x).

And under the stat. 33. H. 8. against obtaining money

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|------------------------------|---------------------------------|
| (s) R. v. Wilson and others, | (u) R. v. Lara, 6. T. R. 565.   |
| 5 T. R. 357.                 | (x) Ib. and 1 Haw. c. 71. s. 1. |
| (t) Ib.                      |                                 |

by false tokens, it is necessary to specify the particular tokens (*x*), for the statute is confined to tokens and letters, in the name of a third person (*y*).

So, under the statute against obtaining money by false pretences (*z*), it is necessary to describe the false pretences, because some false pretences are not within the statute (*a*).

So, in all cases of forgery, it is necessary to set out the forged instrument, that it may judicially appear, that the crime of forgery has been committed, either as an offence at common law, or under the definition of some particular statute.

Next, it is to be considered, how far it is necessary to particularize, in describing the means of effecting a fraud. And first, it may be observed, that if some means be specified, and by those the fraud could have been effected, no objection can be taken on the ground that the description is not sufficiently circumstantial.

In the case of the *King v. Young and others*, the indictment (*b*) stated that the defendants did falsely pretend to one Thomas, that Young had made a bet of 500 guineas, with a colonel in the army, then at Bath, that one Lewis would, on the next day, run on the high road, leading from Gloucester to Bristol, ten miles in an hour; and, that Young and Mullins (*c*) went each 200 guineas in the bet, and Randal (*d*) the other 100 guineas; and, that *under colour* of having made the same bet, they obtained from Thomas 20 guineas, as a part of such pretended bet. It was objected, upon writ of error, that the statement was too general, no person having been specified with whom the wager was laid; but the court held, that this

(*x*) *R. v. Mason*, Leach, 548. case, Leach, 548. *R. v. Muno*, 2

(*y*) *R. v. Pears*, East. P. C. Str. 1127. Leach, 720. 3d ed. 7 Mod. 316. 2 Str. 1127. 2 T. (b) Leach, 568.  
R. 581. (c) One of the defendants.

(*z*) 30 G. 2. c. 24. (d) Another of the defend-

(*a*) 2 Burr. 1127. Mason's ants.

objection was answered by the record. That if the indictment did not inform the defendants what charge they were called upon to answer, the objection would be well founded, but, that it held out to them sufficient intelligence of the offence imputed to them; that the court could not intend that the colonel's name was mentioned, and that the prosecutor could not state it with greater particularity than the defendants used.

And this is very analagous to the offence of obtaining money by extortion, in an indictment for which, it has been holden to be sufficient to charge a bailiff, with having extorted a particular sum of money, *colore officii* (e), without stating the particular threats or menaces; for, it was said he perhaps might claim it generally, as being due to him as bailiff, in which case, the taking could not have been otherwise expressed.

It is not necessary expressly to aver that the tokens, or pretences, were false (f). In Terry's case, the indictment alleged, that he, by a false note, in the name of J. D. obtained into his hands a wedge of silver, and it was holden to be good, though the token was not alleged to be false. So, in Airey's (g) case the indictment was holden to be good, though it did not expressly allege that the pretences were false; but, after setting them out, averred, that by means of the said *false* pretences, the defendant unlawfully obtained from J. B. 16s. with intent to cheat the said J. B. and then negatived the truth of the pretences. The court held, that no technical form or order of words was necessary to express the offence; and, that it was sufficient, if, upon the whole, it appeared that the money had been obtained by means of the pretence set forth, and that such pretence was false.

Where the fraud has been effected, or attempted to be effected, by means of a written instrument, it must,

(e) Sid. 91. 2 Haw. c. 25. s. 57. (g) 2 East. R. 30.

(f) Cro. Car. 564.

without exception, be set out upon the record, in order that the court *may be judicially informed of its criminal nature*; and the same principle extends to indictments for *libels*, and the sending of *threatening letters* (g).

It will next be considered, what precision is requisite in setting forth written instruments, of this nature, upon the face of the indictment.

The allegations, in an indictment for forgery, naturally distribute themselves under the following heads,

First. That the defendant did *falsely make, alter, &c.*

Secondly. The *particular instrument* set forth.

Thirdly. With the *intent to defraud* another.

First. It is sufficient to allege that the defendant forged and counterfeited, though it is usual to aver that he did *falsely* forge and counterfeit, for the adverb is sufficiently implied in the former words (h). In Elsworth's (i) case, the indictment stated that the said T. E. the said bill of exchange did feloniously *alter*, and cause to be altered, by *falsely* making, forging, and adding a cyher O, to the letter and figure 8*l.* in the said bill, and also by *falsely* making, forging, and adding the letter y to the word eight, in the bill mentioned, whereby, &c. The second count alleged, that certain persons unknown altered the bill, and charged the defendant with uttering and publishing the bill, as true, knowing it to be forged. The words of the statute, on which the indictment was founded, (2 G. 2. c. 25. s. 1.) are, "If any person shall *falsely make, forge, or counterfeit.*" It was objected, in arrest of judgment, that the indictment merely charged that certain persons unknown, did alter, *by falsely making, &c.* and did not charge, in the words of the act, that they *falsely made, forged, &c.*; and that the word *alter*, was

(g) R. v. Lloyd, East. P. C. (i) Coram Willes, York,  
1122. Leach, 720. 696. 3d ed. Lent Ass. 1780. East. P. C. 986.  
(h) Sty. 12. 2 Lev. 221. 1 Str. 19.



not used in the statute. But the judges held, that the indictment was good, and that there was no difference in substance, or in the nature of the charge, whether the indictment were for feloniously altering, by falsely making and forging, or for feloniously making and forging, by falsely altering. In the case of the King v. Bigg (*k*), the indictment alleged, that the defendant feloniously *erased* an indorsement from a bank note; the jury found that the defendant had expunged the inscription, by means of some unknown liquor, and the judges held that the prisoner was guilty (*l*).

In consideration of law, every *alteration* of an instrument amounts to a forgery of the whole.

In Dawson's case, it was holden, by ten judges, that the *alteration* of the figure 2, in a bank note, to 5, was a forging of a bank note (*m*).

And, an indictment (*n*) for making, forging, and counterfeiting a bill of exchange, under the st. 7 G. 2. c. 22. was holden to be supported by proof, that the defendant had altered a bill of exchange for the payment of 10*l*. into 50*l*. both in words and figures. It was objected, that the defendant ought to have been charged with altering the genuine bill, since the stat. 7 G. 2. c. 22. makes it a distinct offence to *alter*; but the judges, on the authority of Dawson's case, held that the conviction was proper, and that every alteration of a true instrument, for such a purpose, made it, when altered, a forgery of the whole instrument.

(*k*) 3 P. Wins. 419.

(*l*) The *majority* were of this opinion, but the case involved many other points, and the prisoner was afterwards pardoned.

on condition of transporting himself. Str. 19.

(*m*) East. P. C. 978.

(*n*) Teague's case, coram Le Blanc, Hereford Ass. 1802, East. P. C. 979.

But, in cases where a genuine note, or instrument, has been altered, it is usual to allege the alteration in one count of the indictment.

It is not sufficient to aver, that the defendant forged, or caused to be forged, for it is not certain and positive (o).

Secondly. The *particular instrument set forth*.

Herein may be considered,

1. *In what manner it should be set forth.*

2. *How it should be shewn to be the instrument, (supposing it to be genuine,) the forging of which is prohibited.*

1. The instrument set forth may be prefaced by the words, "to the tenor following," or "in these words," or "as follows," or "in the words and figures following;" for, though the setting out an instrument by the *tenor* (p), which imports a true copy, is the most technical mode, yet it has been holden that the words "as follows," are equivalent to the words "according to the tenor following," or "in the words and figures following," and that, if under such an allegation, the prosecutor fail in proving the instrument, verbatim, as laid, the variance will be fatal (q). And unless the indictment profess, by these, or similar expressions, to set out a copy of the instrument in words and figures, it will be vicious (r). An accurate (s) copy of the instrument, in words and figures (t), must then be set forth, to enable the court to see that it is one of those instruments, the false making of which the law considers to be a forgery (u);

(o) 1 Salk. 342. 5 Mod. 137. Holt. R. 345.

(s) Hunter's case, Leach, 721. Mason's case, Leach, 548.

(p) R. v. Drake. 3 Salk. 224. Holt. R. 347. 349. 350. 425. 11 Mod. 95.

(t) R. v. Powell, Leach, 90. East. P. C. 976. Hart's case, Leach, 172.

(q) R. v. Powell, Leach, 90. 2 Bl. Rep. 787. East. P. C. 976.

(u) Lyon's case, Leach, 696. Mason's case, East. P. C. 975. Gilchrist's case, Leach, 753.

(r) Lyon's case, Leach, 696.

## 94 INDICTMENT.—*Means and Manner.*

a reason, which applies with equal force to indictments for libels and threatening letters (x).

In setting forth the *tenor* of an instrument, a mere variance of a letter will not vitiate the indictment, provided the sense be not altered by changing the word misspelt, into another of a different meaning. Thus (y), in an indictment, for forging a bill of exchange, the tenor was "value *received*;" the bill proved in evidence, was for value *reicevd*, and the judges (z), upon the reserved question, were of opinion that the variance was not fatal, since it did not change the *word* into another. So, in an indictment for (a) perjury, it was assigned for perjury, that the defendant had sworn that he *undertood* and believed, in the affidavit he swore that he *understood* and believed. Upon a motion for a new trial, Lord Mansfield, C. J. said, we have looked into all the cases on this subject, some of which go to a great length of nicety indeed, particularly the case in Hutton, where the word *indicari* was written for *indictari*; but that case is shaken by the doctrine laid down in Hawkins. The true distinction seems to be taken in the Queen v. Drake (b), that where the omission, or addition of a letter, does not change the word, so as to make it another word, the variance is not material (c).

In Elizabeth Dunn's case, the indictment charged the defendant with forging a promissory note, the tenor of which is as follows, and then set out the note, including the attestation, "witness, John Whettal," and also the

(x) R. v. Lloyd, East. P. C. 976.

(y) R. v. Hart, Leach, 172.

(z) De Grey, C. J. and Willes, Justice, were absent. East. P. C. 978.

(a) R. v. Beech, Leach, 158. 2 Haw. c. 46. s. 190.

(b) Salk. 660.

(c) R. v. Beech, Leach, 158. See Salk. 660. R. v. Bear, Carth. 408, Holt, R. 350.

words, "*Mary Wallace, her mark.*" The fact was, that the attestation, and the subsequent words, had been added after the defendant had affixed her mark; and the recorder doubted, whether the indictment had been proved, since the note forged by her, differed from the tenor set out. But Mr. Baron Perrot and Mr. J. Aston were of opinion, that the indictment, in this respect, was well proved (*d*).

*Whether it be necessary to set out the whole of the forged writing.*

In the short report of Smith's case, in the first volume of Salkeld (*e*), it is stated, that the defendant was indicted for forging a deed of assignment of a lease, signed with the mark of one *Goddard, cujus tenor sequitur*, but sets not down the mark as in the assignment; it was objected, that without the mark it could be no forgery, and the objection was over-ruled. But this is a very loose report of the case, which appears to be the same with that reported in the third volume of Salkeld, and by Lord Raymond, under the title of the *Queen v. Goddard* (*f*), according to which the defendant was indicted for forging an assignment of a lease, and the tenor was set out; at the bottom of the assignment was the mark of the assignor, but no mark appeared on the postea;

(*d*) Leach, 68. East. P. C. 961. The defendant directed the name, Mary Wallace, to be affixed to the mark which she had made, and was present when the name and attestation were added. In this case, the question arose, whether to make a mark, in the name of another person, with intent to defraud that person, is forgery; and nine of the judges were of opinion, that it was, but Mr. J. Aston differed from them, and on that account, the defendant was recommended to mercy. Leach, 68.

(*e*) Salk. 342. Pasch. 2 Ann.

(*f*) In 3 Salk. 171. Trin. 2 Ann., *R. v. Goddard et al.* Ld. Ray. 920. *R. v. Goddard and Carlton.*

## INDICTMENT.—*Means and Manner.*

and the whole court held, that since, by the statute of frauds, an assignment must be signed, the want of the mark of the *defendant* (g) upon the *postea*, was a fatal defect, but as another indictment had been found against the defendant, the court gave no judgment, but ruled that the defendant should plead to the *signing* (h). But Lord Holt held, that if the indictment had been for forging a deed (i) of assignment, and the deed had been set forth, without any mark or signing, that might have been good, because signing is not necessary to a deed; for in former times they were sealed only, and not signed (k). And it seems, in all cases, to be sufficient to set out that part of a written document, which comprehends the particular instrument forged, though connected with other matter. Thus, in an indictment for publishing a forged receipt for money, the receipt alone was set forth, as follows, "18th March, 1733, received the contents above, by me, Stephen Withers;" and, upon its appearing in evidence, that the above was forged at the bottom of a certain account, it was objected, that the account itself should have been set forth, for otherwise, it would not appear that it was a receipt for money. But all the judges held the indictment to be sufficient; for it was laid to be a forged receipt for money, under the hand of S. W. for 1*l.* 4*s.* and the bill itself was only evidence to make out that charge (l).

(g) This must be a mistake in the report, 3 Salk. 171. the defendant could not have forged his own mark.

(h) This also seems to be a mistake, for "new indictment" the defendant had been convicted on the *same* indictment.

(i) Mr. East, in his *Pleas of the Crown*, p. 976. cites, Salk. 342. and questions this point.

(k) Salk. 342. Pasch, 2 Ann.

(l) R. v. Testick, 1 East, 100. East. P. C. 925.

## *Fraudulent Means.—Forgery.*

97

2. *How the forged instrument should be shewn to be of the kind prohibited.*

It must invariably be shewn on the face of the indictment, by proper averments, that the instrument forged, is of the particular kind prohibited by the statute upon which the indictment is founded.

A forged instrument cannot in strictness be called by the name of the real instrument which it assumes to be; an instrument, purporting to be a bond or writing obligatory, is not such, for no one is bound by it; and a forged writing, purporting to be a will, ought not in strictness to be called a *will*, for it is not so in any sense; and can have no legal operation whatsoever.

But many statutes describing the offence of forgery, use the words, "and if any person shall forge any *will*, or *bond* (m), or *writing obligatory*, &c."; and, therefore, it may be averred in the indictment, that the defendant forged the *will* (n), *bond*, or *writing obligatory* (o). But it is in all cases proper, and seemingly more correct, to aver, that the defendant forged and counterfeited a certain paper writing, *purporting* to be the last will (or other instrument whose forgery is penal.) In the case of the King v. Birch and Martin it was so averred, and the judges held, that though the statute uses the words, "shall forge a will," it was sufficient to lay it either way (p). And, therefore, in general, if it can be collected from the forged writing itself, that it assumes to be a bond, &c. it may be averred in the indictment, either that the defendant forged a certain bond, or that he forged a certain writing purporting to be a bond. Thus, in

(m) 22 G. 2. c. 25.

(o) *Dunnett's case*, East.

(n) R. v. Birch and Martin, P. C. 985.

(p) Leach, 92. East. P. C. 980.

980. 2 Bl. R. 790.

Taylor's (*q*) case, the defendant was charged with forging a receipt for the sum of 20*l.* as followeth, "Recd. R. Wilson." And in Testick's case (*r*), the tenor set out was, "Received the contents above by me, William Withers"; and this was holden to be properly described as a *receipt*. For in each of these cases the very terms of the forged writing shewed, that it assumed to be a receipt.

The *purport* (*s*) of a writing is that which appears on the face of that writing; if, therefore, the forged writing assumes in terms to be a will, bond, or receipt, it may be described as *purporting* to be a will, bond, or receipt. But in alleging the *purport* of a forged writing, great caution is necessary; for unless it can be collected plainly from the terms of the writing set forth, that it is in form and assumes to be that particular instrument, which, according to the allegation, it purports to be, the indictment will be vicious. Thus in William Jones's (*t*) case, the indictment alleged, "purporting to be a bank note," the writing set forth was as follows: "No. F. 946.—I promise to pay John Wilson, esquire, or bearer, ten pounds, London, March 4th, 1776. For self and Company of *my* bank in England. Entered, T. Jones." And the court were of opinion, that the paper writing did not *purport* to be a bank note, and therefore that the indictment was repugnant. So an indictment for forging a bill of exchange, as purporting to be directed to John King by the name and addition of John Ring, esq. was for the same reason holden to be vicious (*u*). The same was holden of an in-

(*q*) Leach, 255. East. P. C. 977.

(*r*) 1 East, 180.

(*s*) Leach, 757.

(*t*) Leach, 243. East. P. C. 883. Doug. 302.

(*u*) R. v. Jeremiah Reading, Leach, 672.

dictment, which described the subscription C. Olier 'as purporting to be the name of Christopher Olier (x).

And in Gilchrist's (y) case, the indictment charged the defendant with forging a paper writing, &c. purporting to have been signed by Thos. Exon, clerk, and to be directed to *George Lord Kinnaird*, Wm. Moreland, and Thos. Hammersley, of, &c. bankers and partners, by the name and description of Messrs. Rawson, Moreland and Hammersley; the tenor of the bill was then set out as follows, "*Messrs. Rawson, Moreland, and Hammersley*, please to pay, &c. (signed) T. Exon."; and the indictment was by the ten judges present at the conference, holden to be repugnant and defective, for it could not purport to be directed to Lord Kinnaird, since his name did not appear upon the bill.

And with respect to the word *purport*, it is to be observed generally, that its use is to shew that the forged writing falls within the prohibited description; and, therefore, no other description should be given under the word *purport*, except of the particular nature of the forged writing, as that it purports to be a bond, a bill of exchange, a bank note, or the like. Any further description is highly objectionable; since it is unnecessary, and exposes the record to great danger from variance (z).

And the same objection applies to giving any other description of the written instrument, (whose tenor is afterwards set forth,) beyond that of its general nature.

(x) *R. v. Reeves, Leach*, does not appear what the ultimate opinion was.

933. The objection was at first overruled by Heath and Lawrence, Js. and Thomson, B. 982.

who thought there was a shade of difference between this case and that of *Gilchrist*; and it

(y) *Leach*, 753. East. P. C.

(z) See Mr. Justice Buller's observations, *R. v. Gilchrist*, *Leach*, 753.



100 INDICTMENT.—*Means and Manner.*

The defendant was indicted for forging and uttering a bill of exchange, requiring, &c. and signed by *Henry Hutchinson*, for, &c. Upon the trial, the prosecutor proved, that the signature *Henry Hutchinson* was forged; it was then objected, that the indictment averring it to have been signed by him, was disproved; and so the judges held upon reference to them after conviction (a). And an indictment will be defective, if it allege, after describing the forged writing, "by which A. is bound to B.;" for since it is a forgery, A. could not be bound by it (b).

An indictment charged the defendant with forging a *bond and writing obligatory*. The statute, upon which it was founded, mentions bond and also writing obligatory. The instrument set forth purported to be a bond, but the judges held, that it was properly described (c).

In Bigg's case, the prisoner was charged with erasing an indorsement (d) on a bank note: it turned out in evidence, that the inscription charged to have been erased, had been written, according to the custom of the bank, upon the *inside and face* of the bill. The jury found specially, that an inscription so written was commonly called an *indorsement*, and a majority of the judges held, that the description was correct.

Where the instrument is not apparently within the description of the act, it must be brought within it by proper averments, otherwise the indictment will be defective.

In Hunter's case (e), the indictment set forth a navy bill with a certain indorsement upon it, and then alleged, that the defendant did forge a certain *receipt* for money, to wit, for the sum of 25*l.* contained in the said navy bill,

(a) East. P. C. 985.

(b) Bac. Ab. tit. Ind. 556.

(c) R. v. Duunett, East. P.

C. 985. For a bond is a writing obligatory, and at all

events, semble, the subsequent description would be but surplusage.

(d) 3 P. Wms. Str.

(e) Leach, 711.

As follows, that is to say, "*Wm. Thornton and Wm. Hunter.*" In evidence it appeared, that a bare signature written upon a navy bill, operated as a receipt. The prisoner was convicted, but the judges were of opinion, that the indictment was insufficient; for although it avers, that the prisoner forged a certain receipt for money, there is nothing stated to shew, that the instrument, which does on the face of it import to be a receipt, *is in fact a receipt*, or was intended to be a receipt, or could operate as a receipt. That it is not enough to call the signature of these two names a receipt, for they do not, standing by themselves, import to be a receipt; and, therefore, the indictment should have averred, that the said names, *Wm. Thornton and Wm. Hunter*, written on the said paper, imported and signified, that the said *Wm. Thornton and Wm. Hunter* had received the sum of 25*l.* mentioned in the said paper writing.

For the same reason, an indictment for forging a deed must aver that it was sealed (*f*).

And further it has been holden, that if the instrument, as stated with proper averments upon the record, be such as if genuine would be illegal, the indictment will be vicious and ineffectual; and therefore, in the case of the *King v. Moffatt* (*g*), for forging a bill of exchange for the payment of three guineas, without specifying the payee's place of abode, the judges were of opinion, that the forgery did not amount to a capital offence; since, by the statutes 15 G. 3. c. 51. and 17 G. 3. c. 30. (*h*) the bill of exchange, if real, would not have been valid.

And in *Smith's case* (*i*) above alluded to, the court were of opinion, that an indictment for forging an assign-

(*f*) 3 Keb. 388. 3 Ins. (*h*) Made perpetual by 27. 169. *Smith's case*, 3 Salk. 171. G. 3. c. 16.

(*g*) *Leach*, 483.

(*i*) 3 Salk. 371.

ment would be vicious, unless it shewed that the assignment was signed. *The distinction seems to be this*, where the instrument appears to be valid, an indictment may be maintained, although from some collateral defect, that instrument, if genuine, could never legally have been put in ure; otherwise, where the defect is apparent on the face of the instrument. Hence an indictment has been holden to be maintainable for forging a conveyance, though the estate was described by the wrong name (*k*); for forging a protection in the name of one as a member of parliament, who was not so (*l*); for forging and publishing a writing as the last will of a person still living (*m*); for forging an order for the payment of a seaman's prize money, though in fact the seaman was, at the time when the note bore date, in a situation which rendered the order invalid under the stat. (*n*) 32 G. 3. c. 34. s. 2.

And to go one step further, it has been frequently decided (*o*), that an indictment is maintainable for forging an instrument upon paper, &c. without a stamp, even though a stamp could not afterwards be legally impressed, on the ground that the revenue laws do not make any alteration in the offence of forgery. And this seems to be a mean class of cases between those where the defect is altogether collateral to the instrument, and does not appear on the face of it, and those where the defect exists in the very form and structure of the instrument; as where an assignment of a lease is forged without a sig-

(*k*) Japhet Crooke's case, 117. Cogan's case, 2 Leach, Str. 901. Fitzg. 57. Master- 503.

man's notes.

(*n*) R. v. M'Intosh, East.

(*l*) R. v. Deakins, 1 Sid. 142. P. C. 965.

(*m*) R. v. Murphy, 10 St. Tr. 183. R. v. Sterling, Leach, Leach, 295. East. P. C. 955. Morton's case, East. P. C. 955.

nature, or a bill of exchange for three guineas, without specifying the payee's place of abode. For an instrument wanting a proper stamp, is apparently and obviously defective; but still the defect does not exist in the form and construction of the instrument. It is not necessary, here to consider, how far, in order to support the allegation of forgery, the writing set out must agree, in form, with the kind of instrument which it is described to be; but it may be observed, generally, that, after setting forth the instrument, and shewing by proper averments that it is within the definition on which the indictment is founded, it is unnecessary to shew that it was stamped (o); or to set forth any collateral circumstances which might be necessary, in order to give the instrument (supposing it to be genuine) a legal operation.

Thirdly. *With the intent to defraud another.*

In indictments for forgery it is also necessary to allege, that the act was done with intent to defraud a particular person or body; the averment of intention properly belongs to another division of the subject; but it may be observed here, that it is sufficient to allege a general intention to defraud a particular person, *which intention must be proved as laid (p).*

But it is not essential, either in indictments for obtaining money under false pretences, or in case of forgery after setting out the false pretences or forged writing, to aver the particular means by which the false pretences were made available in the one case, or how the forged writing was to be made the instrument of fraud in the other.

Thus, in the case of *R. v. Young (q)*, above referred to, after stating the false pretence; namely, a wager, which was pretended to have been betted upon a foot-race, the

(o) *R. v. Morton*, East. P. C. Elsworth's case, East. P. C. C. 955. 986. and see East. P. C. 988.

(p) *Powell's case*, Leach, 90. (q) 3 T. R. 176.

indictment avers that the defendant, under colour and pretence of having made the bet, obtained from the prosecutor the sum of 20 guineas, as a part of such pretended bet, with intent to cheat and defraud him thereof, without stating by what particular inducement they obtained the money. And in case of forgery, it is sufficient to aver generally, that the defendant intended to defraud a particular person, without shewing how upon the record (q).

*Of stating the means and manner in an indictment for perjury.*

It was formerly the practice to set out the whole of the circumstances in an indictment for perjury, with great prolixity. In Coke's Entries (r), an information under the statute first sets out the statute itself, next the pleading in an action of ejectment, the issue joined, the proceedings upon the trial, the evidence given previous to that on which the perjury is assigned, the evidence on which the information is founded, and the assignment of perjury upon that evidence. But in later times this unnecessary and dangerous minuteness of detail has been much abridged, and principally by an excellent statute passed in the reign of George the Second, which (s) was made in order to remove difficulties attending prosecutions for perjury, and which enacts, that "in every indictment or information to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath was taken, averring such court to have competent authority to administer the same, together with the proper averment or averments to falsify the matter or

(q) Powell's case, Leach,      (r) Co. Ent. Inform. 367.  
90. East. P. C. 989. Els-      See also Co. Ent. 165, 166,  
worth's case.      (s) 23 G. 2, c. 11.

matters wherein the perjury or perjuries is or are assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed."

It has frequently been regretted by the judges(*t*), that prosecutors do not avail themselves of this beneficial law, from inattention to which, danger is too frequently incurred, by the introduction of circumstances upon the record, which the statute has declared to be superfluous.

The indictment ought to shew,

1. That a *cause, complaint, petition, &c.* is depending,
2. Before a *court of competent jurisdiction.*
3. That the *matter sworn to was material.*

And further,

4. The *substance of the matter sworn* must be set out.
5. And *perjury* must be assigned upon it.

1. It is sufficient, under the act, to allege, generally, that there was a certain cause depending, and that it came on to be tried in due form of law (*u*). So where a person is indicted for perjury committed upon the trial of a prisoner for murder, it is sufficient to allege, that A. B. was in due form of law tried upon a certain indictment then and there depending against him for the murder of C. D. &c. and that the defendant committed the perjury upon that trial (*x*), or that a certain complaint was made, &c. to one E, F. then being lord chancellor of Great Britain (*y*).

(*t*) 5 T. R. 317.

(*x*) 5 T. R. 520.

(*u*) Per Buller, J. R. v. . (y) R. v. Aylett, 1 T. R. 63.  
Dowlin, 5 T. R. 320.

And it is unnecessary in any case to set out any part of the indictment, declaration, plea, &c. or the issue to be tried at the time when the perjury is alleged to have been committed (z).

2. Before a court, &c. of competent jurisdiction.

The statute 23 G. 2. c. 11. expressly directs that it shall be sufficient to state by what court or before whom the oath was taken, averring such court or person or persons to *have competent authority to administer the same*, without setting forth the commission or authority of the court or person or persons.

And therefore to set out the authority of the court would be highly improper, for if the indictment profess to set it out and fail, the defect will be fatal (a).

It is sufficient to say, "he the said A. B., &c. then and there having competent power and authority to administer, &c (b).

In the case of the King v. Alford (c), the defendant was indicted for perjury in the course of a cause tried at the assizes.

The caption of the indictment mentioned the names of both the justices named in the commission, but the defendant was alleged to have been sworn before one only. Baron Eyre doubted whether it should not have been alleged that the oath was taken before *both* the justices mentioned in the commission. It was also doubted whether there was not a variance, since the *nisi prius* record stated, in the usual form, that the trial was before the justices. But the judges were unanimously of opinion, that the conviction was proper.

(z) R. v. Dowlin, 5 T. R. 320. and under the express provision of the statute. (b) R. v. Jole, Trem. P. C. 139.

(c) Leach, 179.

(a) Per Lord Kenyon, C. J. R. v. Dowlin, 5 T. R. 317.

3. *That the matter sworn to was material.*

Although it is no longer necessary to set out the proceedings at length, but sufficient to set forth the substance of the offence, it is necessary to shew that the point falsely sworn to, was material to the question depending (*d*); for if it were irrevelant, though false, no indictment can be founded upon it (*e*). And therefore in the case of the King v. M'Keron, the indictment was holden to be vicious, for the want of an averment that the question was material (*f*). But it seems to be sufficient to aver, that it then and there became and was a material question upon the trial of the said cause, whether, &c. without shewing what issue was joined, or any other previous circumstances or evidence in the cause (*g*). And in stating the question, which is averred to be material, it seems proper to mention those circumstances which must afterwards be connected with the terms of the defendant's oath, in order to assign perjury upon that meaning (*h*). Thus it may be stated, that it then and there became and was a material question, whether A. B. was at N. in the county of D. at such a time; and then, after setting forth the oath of the defendant, that A. B. was at N. *meaning* the said N. in the county of D.; it may be assigned, for perjury, that the said A. B. was not at N. in the county of D. at the time specified (*i*).

But where such facts and circumstances are set out, as shew plainly that the question was material to the

(*d*) Per Lord Mansfield, R. for the judges, on the point v. Aylett, 1 T. R. 64. R. reserved. 5 T. R. 318.

v. M'Keron, 5 T. R. 318. (*g*) 5 T. R. 318.

(*e*) R. v. Griepe, Ld. Ray. 256. (*h*) R. v. Aylett, 1 T. R. 64. obj. 2.

(*f*) Coram Buller, J. Lancaster, Lent Ass. 1792. and be- (*i*) See below, and Ld. Ray. 256.



issue, the express averment does not appear to be necessary, and is rarely to be found in the older precedents, where the facts are described at length (*k*). And therefore the averment may be omitted, where the perjury is assigned upon an affidavit on a question before the court, where the materiality appears from setting forth the contents of all the affidavits relating to the subject upon the record (*l*).

4. The *substance of the matter sworn* must be set forth:

It must be alleged that the defendant was upon oath; and for this purpose it is sufficient to aver, generally, that he was *duly sworn* to speak the truth, of and concerning, &c.; and if it be averred that he was sworn upon the gospels, and it turn out that he was sworn in some other manner, according to a particular custom, and not upon the gospels, the variance would be fatal (*m*), though it would *be no variance* if he were sworn both ways (*n*).

In setting forth the matter sworn, it is not essential to profess the same particularity as is necessary in indictments for forgery and libel, which must assume to set out an exact copy. But it seems sufficient to say, that the defendant, upon the trial of the said cause, &c. did falsely say, depose, and swear, that, &c. or to the effect following, that, &c. (*o*); or where the evidence is given before a jury or a magistrate *ore tenus*, to aver that the defendant falsely, maliciously, wilfully, and corruptly said; deposed, and swore, that, &c. (*p*). Where the perjury is assigned upon an affidavit, it is usual to allege, deposed and

(*k*) See the Entries in Tremaine, P. C. 139, &c. and Co. Ent. 166, 367. R. v. Crossley, 7 T. R. 315.

(*l*) R. v. Crossley, 7 T. R. 315.

(*m*) R. v. M'Carther, Peake, 155.

(*n*) Ib.

(*o*) See the Ind. in R. v. Aylett, 1 T. R. 64.

(*p*) Trem. P. C. 139.

swore in writing as follows: that is to say (*q*), &c. or falsely and corruptly said, swore, and deposed, that (*r*), &c. and then the affidavit must be correctly set out, and a variance which altered the sense would be fatal (*s*). But in some of the older precedents, both the interrogatories and the answers on which the perjury is assigned, are set out in English (*t*).

It frequently is necessary, with a view to the subsequent assignment of perjury upon the defendant's statement, to point the defendant's meaning, (when it is too generally expressed), to particular facts and circumstances; this is to be effected by means of an *innuendo*, which may be defined to be,

An averment which explains the defendant's meaning (*u*), by reference to antecedent matter (*x*). It signifies no more than the words "*id est scilicet*," or "meaning," as explanatory of a subject matter sufficiently expressed before, as such a one, meaning A. B. or such a subject, meaning the subject in question (*y*).

And, since this is the proper office of an innuendo, if it go beyond it, and materially enlarge the sense of the words which it is intended to explain, by introducing new matter, it will vitiate the indictment or declaration in which it is used. Thus, the words, he has burnt my barn, cannot, by the mere aid of an innuendo, be extended to mean "his barn full of corn," for that is not an explanation of what was said before, but an addition to it (*z*).

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|---------------------------------------|------------------------------------|
| ( <i>q</i> ) R. v. Jole, Trem. P. C.  | ( <i>u</i> ) Yelv. 21. 1 Cro. 378. |
| 139.                                  | ( <i>x</i> ) R. v. Alderton, Says  |
| ( <i>r</i> ) R. v. Stone, Trem. P. C. | 280. R. v. Matthews, 9 St.         |
| 148.                                  | Tr. 52. Cowp. 672. 4 Co. 17.       |
| ( <i>s</i> ) R. v. Beech, Leach,      | 2 Salk. 513. 1 Ld. Ray. 256.       |
| 158. May's case, Leach, and           | Saund. 243.                        |
| supra, p. 94.                         | ( <i>y</i> ) Per De Grey, C. J.    |
| ( <i>t</i> ) R. v. Brookes, Trem.     | Cowp. 683.                         |
| P. C. 155. R. v. Southerton,          | ( <i>z</i> ) Ib. and 4 Co. 17.     |
| Ib. 155. Ib. 162.                     |                                    |

In Griepes's case (y), it appeared that Mr. Strode, upon the trial of a replevin cause, proved the execution of certain indentures of lease and release, bearing date the 15th and 16th of July, 1681, at Albermarle-house, in the parish of St. Martin in the Fields, Westminster. Griepes was a witness upon this trial, and the information, charging him with perjury, alleged to have been committed on that occasion, averred, that he swore that Mr. Strode, meaning the said witness, was commorant all the middle of the month of July, innuendo of the year 1681, at Newnham, *innuendo, Newnham in the county of Devon*; and assigned, by way of breach, that the said E. Strode was not at Newnham, in the said month of July. The defendant was convicted, and upon motion in arrest of judgment, the judges, after giving the case great attention, delivered their opinions very fully. Lord Holt, C. J. differed from his brethren in some respects, but upon these points they all agreed, 1. that the information would be vicious without an innuendo (z); 2dly, that the innuendo was ill, because it introduced new matter; and they all held, that an innuendo could not supply a previous defect in certainty; for an innuendo signifies nothing, unless there be some matter of fact precedent to which it may refer.

And it seems that the information in this case ought to have alleged, in the first place, that the question was, whether Mr. Strode was at Newnham, in Devoushire,

(y) Lord Ray. 256.

(z) Rokeby, Turton, and Eyre, Js.; because, without shewing where Newnham was, it would not appear that the matter sworn was material to the issue. Lord Holt, C. J. considered the question to be material to the issue, whereso-

ever Newnham was, but since, without an inquendo, it was uncertain where Newnham was, it could not be intended to be in any county; and therefore, without an innuendo, he conceived that the breach assigned was ill for uncertainty.

at a time specified; and then the subsequent averment, that the defendant swore that Mr. Strode was at Newnham, innuendo Newnham in Devonshire at that time, would have been proper (a).

Where however the new matter thus introduced is superfluous, the sense being complete without it, the innuendo may be rejected as surplusage. As in the case of *Roberts v. Cambden* (b), where the words "attorney-general" were alleged to mean the attorney-general for the county palatine of Chester. So in *Aylett's* case (c) the indictment alleged, that the defendant did depose and swear, of and concerning the said complaint, to the effect following, to wit, that he the said E. Aylett was arrested on the steps of his own door, and before he had been *within* the door of his house; innuendo, that he was arrested upon the steps of the *outer door* of the said house, and before he the said E. A. had been within the door of his said house. It was objected, that the innuendo introduced a new idea not warranted by the introductory matter, viz. the *outer door* of his house; but the objection was not allowed, because the innuendo was unnecessary. And the same rule applies where the innuendo is insensible or repugnant (d).

But if any use be made of the *innuendo*, it cannot be rejected as surplusage (e); nor can the defect be cured by verdict, for in *Griepe's* case the court said, a man's

<p>(a) Judgment was arrested on these grounds; but the court, being satisfied that the defendant was guilty, gave leave to the prosecutor to exhibit a new information; but the House of Lords saved the prosecutor this trouble, by reversing the</p>	<p>judgment of the K. B. without assigning any reason.                  (b) 9 East, 83.                  (c) 1 T. R. 65.                  (d) Cro. Car. 512.                  (e) R. v. Griepe, Ld. Ray. 256.</p>
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## 112 INDICTMENT.—*Means and Manner.*

meaning, abstracted from the fact, cannot be put in issue.

And if a place generally mentioned by name, as Newnham, be explained by the innuendo to mean a particular place, as Newnham in Devonshire, then though the breach be general, as that the person was not at Newnham, the breach must be taken to refer to Newnham in Devonshire, the last antecedent; and, therefore, if the innuendo be defective, the indictment will be vicious, though after verdict (*f*).

In alleging perjury to have been committed in an affidavit in any court, &c. the usual form is to state, that the defendant came before the court, and exhibited the affidavit or paper writing, that court having competent authority, &c.; and that he swore falsely such and such things; without adding, that any use was afterwards made of the affidavit, or referring to the files of the court (*g*). For the guilt of the party who makes the affidavit, cannot depend upon the subsequent use which is made of it. Though where the proceeding is under the statute of Elizabeth, by which an action is given to the party injured by the false oath, it should be shewn, that the affidavit was produced and used against that party (*h*).

### 5. *Assignment of perjury.*

The assignment in general consists of express contradictions of the defendant's statement, as explained by the innuendos; and it will be vicious, if it be more particular than the assertion which it is meant to contradict (*i*). Thus, if the defendant swear that A. B. was

(*f*) 2 Ld. Ray. 261.

403. Trem. P. C. 136. R. v.

(*g*) R. v. Crossley, 7 T. R.

Jole, ib. 138. R. v. Brookes,

315. R. v. Hawkins, Trem. ib. 151. 155.

P. C. 167. R. v. Stone, ib.

(*i*) R. v. Grieve, Ld. Ray. 256.

(*h*) Holt. R. 534. Skinn.

at Newnham, the breach averring that A. B. was not at a *particular* place mentioned and known by that name, is faulty; for he might have been at Newnham, though not at the Newnham specified (*l*). The breach in such case ought to be assigned thus, that A. B. was not at any vill known by the name of Newnham; or thus, was not at Newnham aforesaid, or at any other Newnham (*m*).

III. *Illegal solicitations, attempts, and endeavours.*

In this class of offences it is also in general essential to the validity of the indictment, that the particular means and manner should be set out, in order that the court may see that they amount in law to the crime imputed.

The exceptions to this rule consist of cases, where the means are either perfectly indifferent, provided the criminal object be accomplished, or where they are made up of a number of circumstances, which cannot well be described upon the record without the aid of a general term of art.

And 1st. the general rule is, that the *means should be set out*.

Thus, if words be spoken to a justice of the peace in the execution of his office, the words must be set out as they were spoken (*n*), and it is not sufficient to aver generally, that the defendant spoke divers scandalous, threatening, and contemptuous words.

So in an indictment under 6 & 7 W. 3. c. 11. for profane cursing and swearing, it was necessary to set out the particular oaths and curses; because, as was said in

(*l*) R. v. Griep, *Ld. Ray.* (m) *Ib.*  
256. (n) 2 Str. 699.

114 INDICTMENT.—*Means and Manner.*

the case of the King (o) v. Sparling, what is a profane oath or curse, is a matter of law, and ought not to be left to the judgment of the witness; he may think false evidence is so.

So in an indictment for blasphemous or seditious words; they must be stated, that the court may judge whether they be seditious or blasphemous (p).

And in all indictments or informations for libels, the libel must be set out in the terms in which it was published (q).

And it would be insufficient to aver merely, that the defendant published a libel *ad effectum sequentem* (r), since the court must judge of the words themselves, and not of the construction which the prosecutor puts upon them. This point was solemnly decided upon the trial of Dr. Sacheverell, for high crimes and misdemeanors, before the House of Lords, upon an impeachment by the House of Commons. Before the opinion of the court had been taken upon the defendant's guilt, a doubt was raised whether the objectionable passages in the sermons which the defendant had preached, and for which he was impeached, should not have been set forth upon the face of the impeachment; and it was proposed to all the judges, *whether by the law of England, and constant practice in all prosecutions, by indictment or information, for crimes and misdemeanors by writing or speaking, the particular words supposed to be criminal, must*

(o) A general form of conviction is given by the statute Ray. 414. 2 Salk. 417. 3 Mod. 71.

19 G. 2. c. 21. Str. 497.

(r) 2 Salk. 417. R. v. Bear;

(p) Str. 498. 686.

1 Lord Ray. 414. Holt. R.

(q) 6 T. R. 162. 1 Ld. 348. 350.

*not be expressly specified in such indictment or information?*

The judges present unanimously answered the whole of this proposition in the affirmative. But the lords afterwards resolved, that they would determine the impeachment, according to the law of the land, and the law and usage of parliament, and that, by the law and usage of parliament, in prosecutions, by impeachment, for high crimes and misdemeanors by writing or speaking, the particular words supposed to be criminal (*s*), are not necessary to be expressly specified in such impeachment.

It was afterwards contended, that this rule of common law extended to indictments for treason, where the overt act was laid to consist in the publication of letters; but the objection was overruled in Francia's (*t*) as well as in Layer's (*u*) case.

Upon the latter trial, when the objection was pressed, Mr. Justice Eyre reprobated the opinion given by the judges in Sacheverell's case, and said, that it was a great surprise to Westminster Hall, and particularly to those who attended the Court of King's Bench, to hear that such an opinion had been given.

There seems, however, to be a wide distinction between indictments for high treason, where written publications are relied upon as overt acts, and indictments or informations in case of libel or perjury; for in the former case, the traitorously imagining or compassing of the king's death, constitutes the offence, and the letters or words are mere evidence of it, the sending or publishing of which certainly may amount to an overt act, though

(*s*) Sacheverell's case, St. Tr. 9 Ann.

(*u*) 6 St. Tr. 330. 9 G. 1.

See Ld. Preston's case, 4 St.

(*t*) St. Tr. 3 G. 1.

Tr. 410. 2 W. & M.



the very words cannot be precisely ascertained; as where letters are sent to a person in open hostility with this country; now, though the statute (y) directs, that the record shall apprize the defendant of the overt act intended to be proved against him, it does not require a greater particularity, on the record, than is necessary in proof upon the trial, nor does it alter the nature and measure of evidence.

But in case of indictments for libel or perjury, the very words so constitute the offence, that, unless they be set forth, it cannot judicially appear that the defendant is guilty of the crime alleged against him. And Mr. J. Powys, who was one of the judges who were consulted in Sacheverell's case, and who also sate upon the trial of Layer, noticed this distinction on the latter occasion, when it was objected that the treasonable letters ought to have been copied upon the record.

It appears, indeed, that it was formerly not unfrequent in indictments for treason, perjury, and libel, to set out the words in Latin, though published in English (z).

But in the reign of Ann the practice was otherwise as to libels, &c. as appears from the answer of the judges in Sacheverell's case, and their resolution seems to be law at this day.

In the case of the Queen v. Dr. Drake (a), Holt, C. J. is reported to have said, "A libel may be described either by the *sense* or by the *words*; but, by the chief justice's application of this doctrine (b), it appears that he did not

(y) 7 W. 3. c. 3.

(a) 3 Salk. 224. Holt. R.

(z) See Mr. J. Eyre's observations, Layer's case, 6 St. Tr. 331. 95.

Hugh Pyne's case, Cro. (b) Holt. R. 426.

Car. 117. Dr. Drake's case, Holt, 35.

mean that a mere description of the words by their effect would be sufficient; for he observes, "A libel may be described either by the sense or the words of it, and therefore an information, charging that the defendant made a writing containing such words, is good, and in that case a nice exactness is not required; because it is only a description of the sense and substance of the libel, and if the jury find some omissions, it will be sufficient if *some words be proved* (a)." The latter expression, "if some words be proved," renders it probable, that Lord Holt meant to say, not that it is unnecessary to state the words themselves, but that they may be stated two ways, either by their *tenor*, in which case the pleader undertakes to set out the words with the greatest precision, and the libel given in evidence must agree exactly with the one set out in the information; or by stating that the defendant made a writing, containing *inter alia* the words set out; in which case it would be necessary to set out those only which are material, and a variance would not be fatal, unless the sense were altered.

In the case of *Newton v. Stubbs* (b), the action was brought for words spoken, which were set out in the declaration *ad tenorem et effectum sequentem*; and after verdict for the plaintiff, judgment was arrested, because it was not expressly alleged that the defendant spoke the very words.

In the case of the *King v. Bear* (c), the indictment was for composing, writing, making, and collecting several libels, *in uno quorum continetur inter alia juxta tenorem et ad effectum sequentem*, and the words were then set out.

(a) Holt. R. 426.

(c) 2 Salk. 417.

(b) 3 Mod. 71.

And it was agreed that *ad effectum* would of itself have been bad, since the court must judge of the *words themselves*, and not of the construction the prosecutor puts upon them; but that the words *juxta tenorem sequentem* import the very words themselves (c). And it was holden, that the words "*ad effectum*" were loose and useless words; but that the words *juxta tenorem* being of a more certain and strict signification, the force of the latter was not hurt by the former, according to the maxim "*utile per inutile non vitiatur*."

In the same case, (e) that of *Ford v. Bennett* was referred to; where, in a special action upon the case against Bennett and others, the plaintiff declared that the defendants, at Saltashe, procured a false and scandalous libel against the plaintiff to be written under the form of a petition, and the libel was set out after the words *continetur ad tenorem et ad effectum sequentem*. Two were found guilty, upon which judgment was entered for the plaintiff, and afterwards upon error brought in the Exchequer Chamber, the judgment was affirmed; the exception taken to the words *ad effectum* having been overruled without consideration. And Holt, C. J. said, that he then thought the judgment to be given with too great precipitation; but that he afterwards, upon great consideration, *had esteemed it to be very good law*. And the King v. Fuller (f), and the King v. Young (g), were cited as authorities in point; and the whole court were of opinion, that notwithstanding the exception, the indictment was good; but that if it had been only *ad effectum sequentem*, it had been ill, because it had not imported that the words were *the specific words* which were in the libel.

(c) 2 Salk. 417.

(f) Mich. 4 W. &amp; M.

(e) 1 Lord Ray. 415.

(g) Mich. 4 W. &amp; M.

• And the statement of the words written or spoken must correspond with the publication to be proved (h).

Therefore, an indictment for speaking these words of a magistrate (i), "He is a broken down justice," is not satisfied by evidence of the words, "You are a broken down justice." Lord Kenyon, indeed, in this case held, at nisi prius, that it was sufficient to prove the *substance of the words stated*, and the defendant was found guilty; but the point was reserved, in order that a verdict of acquittal might be entered, in case the court should be of a different opinion. On motion to that effect, Buller, J. said, that there was a case in Strange in support of his lordship's opinion; but that it had since been overruled in Lord Mansfield's time, and that he himself had known a variety of nonsuits on the same objection; and judgment was given for the defendant.

In the case of *Zenobio v. Axtell* (k) judgment was arrested, because a libel published in French had not been set out in the original language, but had been merely described by way of translation; and Lord Kenyon, C. J. upon that occasion observed, that from the uniform current of proceedings, it appeared that the original words should be set forth, with an English translation, shewing their application to the plaintiff.

With respect to variances from omission, it seems in all cases sufficient to set out the words which are material, and it is not even necessary to state words which may qualify the objectionable ones; and in the case of libel,

(h) B. N. P. 5, cites 2 Roll. (i) R. v. Berry, 4 T. R. Ab. 18. a. *Avarillo v. Rogers*, 217. *Blisset v. Johnson*, Cro. T. T. 1773. 2 East, 434. 8 T. Eliz. 503, contra. R. 150. 4 T. R. 217. Cro. Eliz. (k) 6 T. R. 162, 224. But see *Dyer*, 75.

120 INDICTMENT.—*Means and Manner.*

it may be averred *in uno quorum continetur inter alia*, &c. (m); for if something else were added, which did in fact qualify the objectionable words, it may be given in evidence on not guilty (n).

(m) R. v. Beare, Holt. R. 350.

(n) 2 Mod. 317. 8 Mod. 329. In Sir J. Sydenham's case, Cro. J. 407. an action was brought for these words: "If Sir John Sydenham might have his will, he would kill all the true subjects of England, and the king too; and he is a maintainer of papistry and rebellious persons." The defendant pleaded, that he spake other words, *absque hoc*, that he spake these. The jury find that he spoke these words: "*I think, in my conscience*, if Sir John Sydenham," &c. and found all the other words verbatim, and conclude *si super totam materiam*, he spake the words *forma qua* the plaintiff declared, they find for the plaintiff to his damage of 160 marks, if otherwise, for the defendant. And three of the judges, Montague, C. J. Croke, and Dodderidge, J. held, that the plaintiff was entitled to judgment, since the other words found were not words of extenuation or alteration of the sense of the former words, but rather enforced

them, and that there was no cause to stay the plaintiff's judgment.

For though the plaintiff declared of more words than the defendant spake, yet he declaring truly that the defendant spake those words, upon the evidence it appears that he spake these words which are actionable; and the words added, diminish not, nor are an alteration of the sense of the words whereof he declares; wherefore, although the issue be specially found, yet the plaintiff shall have judgment.

The fourth judge (Houghton) was of opinion, that the omission of part of the words proved, though the sense was unaltered, was a fatal variance.

A writ of error was afterwards brought upon this judgment, and one ground of error assigned was, the variance between the words declared upon and proved; and of this opinion were Hobart, C. J. of the Common Bench, Winch, and Denham; but Tanfield, Chief Baron, Warburton, Bromley,

In the different reports of the case of the Queen v. Drake, a distinction is made between cases where the libel is set out *juxta tenorem*, or in *hæc verba*, and where it is set out under an *inter alia*; but there seems to be little distinction between them, since, under the latter averment, some of the words must be proved as laid, and any variation *from the sense* would be fatal. It is to be observed too, that the word *tenor* does not necessarily imply an undertaking to set out a copy of the whole publication without any addition or diminution whatsoever, since it has been holden, that neither the mis-spelling of a word, by the addition or omission of one or more letters (*o*), nor even the addition of several superfluous words, will constitute a fatal variance (*p*).

If the additional words proved be altogether unimportant, their insertion would have been nugatory; if their effect be to alter the sense of the part already set out, the defendant will have the advantage of it by giving it in evidence under the general issue.

One count of a declaration stated the words of a libel as follows: "My sarcastic friend, by leaving out the repetition or chorus of Mons. T.'s poem, greatly injures the *tout ensemble*, or general and combined effect." The words proved in evidence were "My sarcastic friend, ΜΩΡΟΣ, by leaving out," &c. And it was holden by Lord Ellenborough, C. J. upon trial of the cause, that there was a material variance between the libel declared upon in that count and the libel proved, and that the plaintiff was not entitled to recover on that count.

and Hutton, were of a contrary opinion, whereupon the judgment was affirmed. P. C. c. 46. s. 190. Salk. 660. R. v. Bear, Holt. R. 350.

(*p*) Elizabeth Dunn's case,

(*o*) Hart's case, Leach, 172. Leach, 68. East. P. C. 962. R. v. Beech, Leach, 158. May's 8 Mod. 329. Vide supra, 93, case, Leach, 227. See Haw. 94.

But though it is not necessary to state the whole of a libellous publication, yet, if the most offensive parts be selected, the passages which are not continuous in the original must not be set out continuously in pleading, since any alteration of the sense arising from such new arrangement would be a ground of nonsuit (n).

The correct mode of setting out two selected passages in the same count, is by saying, "In a certain part of which said libel there was and is contained, &c. and in a certain other part of which said libel there was and is contained," &c. (o).

*With respect to the alteration of a single letter*, the rule seems to be, that if the sense be thereby altered, the variance will be fatal, but not otherwise (p).

*When the libellous quality is derived from circumstances extrinsic of the words, the connection with those circumstances must appear.*

The technical mode of effecting this is, by first stating in the introductory part of the indictment those extrinsic facts, by reference to which the writing becomes criminal; secondly, averring generally, that the libel related to those facts; and, thirdly, connecting, by innuendoes, such parts of the publication as want explanation, with the introductory facts previously exhibited upon the record.

In the *King v. Horne* (q), De Grey, C. J. observed, "In the case of a libel, which does not in itself contain the crime without some extrinsic aid, it is necessary that it should be put upon the record, by way of introduction

(n) 1 Camp. 350.

Case, Leach, 172. Doug. 194.

(o) 1b. per Lord Ellenbo-

3 Salk. 224.

rough.

(q) 2 Cowp. 683. Vide su-

(p) *R. v. Beech*, Leach, 158.

pra, 109, tit. Perjury.

2 Haw. c. 46. s. 190. Hart's

if it is new matter, or by way of innuendo if it is only matter of explanation. For an innuendo means no more than the words "*id est*," "*scilicet*," or "meaning," or "aforesaid," as explanatory of a subject matter sufficiently expressed before, as such a one, meaning the defendant, or such a subject, meaning the subject in question."

If the innuendo materially enlarge the sense of the words, it will vitiate the indictment.

In the case of the *King v. Alderton* (r), the alleged libel was contained in an advertisement, reciting certain orders made for collecting money, on account of the distemper among the horned cattle, advertised by the clerk of the peace for the county of Suffolk; and it charged, that by these orders the money collected had been improperly applied. The information stated this to be a libel upon the justices of Suffolk. In the body of the libel it was not said, "by the order of the justices," nor did the information, in the introductory part, say that it was a libel of and concerning the justices of Suffolk. But when the information came to state any of the orders in the advertisement, it added this innuendo, "meaning an order of the justices of peace for the county of Suffolk;" but these innuendos could not supply the want of an averment in the introductory part, of its having been written "of and concerning the justices," because they were not explanatory of, but in addition to the former matter. And the court were of opinion, that the information having omitted the words "of and concerning the justices," in the introductory part, such omission was fatal, and judgment was accordingly arrested.

In the case of *Hawkes v. Hawkey* (s), it was decided

(r) Say. R. 280.

(s) 8 East, 427.



that where the introductory matter has been properly stated, it is necessary to connect the whole publication with it, by means of a general averment that it related to such previous matter, and that it was not sufficient to do it by means of an innuendo only.

Upon motion in arrest of judgment, Lord Ellenborough, C. J. was of opinion, that it might be collected from what Lord C. J. De Grey said, in *Barham's case* (*t*), that he conceived an introductory averment that the defendant had a barn full of corn, *and also* an averment that the defendant spoke the words in a discourse concerning that barn, necessary to warrant the innuendo—"my barn full of corn." His Lordship added, "If a broad rule has been laid down as to the mode of declaring, in this species of action, whether properly laid down or not in the first instance, it is better to abide by it than to attempt making nice distinctions. The only peculiarity in this case which is relied upon, as distinguishing it from the current of authorities, is the preliminary matter averred respecting the fact of the plaintiff having put in his answer to the bill filed in the exchequer; and the question is, whether the innuendo *alone* will refer the words spoken to such introductory matter, so as to make it necessary for the plaintiff to prove any thing which he must have proved had a colloquium been laid; the case of *Savage v. Robery* seems to shew that it will not."

And the court (*u*), after considering the case of the *King v. Horne*, gave judgment for the defendant.

In many instances, however, an innuendo will not vitiate the proceedings, though new matter be introduced.

As, where the matter is superfluous, and the cause of action complete without it.

(*t*) 4 Co.

(*u*) Cowp. 680.

The plaintiff alleged (x), that the defendant addressed these words to him, "Thou art a rogue and a rascal, and hast killed thy wife;" innuendo, one Elizabeth, late wife of the plaintiff. And the plaintiff had judgment, though the declaration contained no prefatory averment that the wife was dead.

So, where the words were laid (y), "Thou hast robbed the church," (innuendo the church of St. Alphage), no objection was taken.

In *Craft v. Boite* (z), the words, as laid in the declaration, were, "He" (meaning the plaintiff) "hath stolen two hundred pounds worth of plate out of Wadham College," (meaning a college called Wadham College, in the university of Oxford), though the declaration contained no previous averment of Wadham College, in the university of Oxford (a).

In *Roberts v. Cambden* (b), the defendant said, "He" (meaning the plaintiff) "is under a charge of a prosecution for perjury. G. W. had the attorney-general's directions to prosecute;" and an innuendo that the attorney-general for the county palatine of Chester was meant, was rejected as surplusage.

(x) *Wilner v. Hold*, Cro. Car. 489.

(y) 4 Cro. J. 153. 1 Vin. Ab. 512.

(z) 1 Will. Saun. 243.

(a) It is suggested by the learned editor of *Saunders's Reports*, that the innuendo is on such account improper; the objection, however, appears to be rather of form than of substance; and probably such a declaration would be held

good on general demurrer or after verdict, since the gist of the action is the charge of stealing from Wadham College, which is entirely unconnected with the situation of the college in the university of Oxford, so that the innuendo might be expunged without affecting the cause of action.

(b) 9 East, 83.

It does not, in any case, appear to be necessary, that the innuendo should in terms state the legal inference which is to be drawn from the publication, as connected with the facts stated, its office seems more properly confined to mere reference of the defendant's meaning to previous matter; and, indeed, such an averment would be improper, since the criminal nature of the charge is a matter of law, which the court will collect from the facts, if they warrant such a conclusion; and if they do not, no innuendo of their legal effect will avail to render them actionable.

Thus, where, from the circumstances, it appears upon the whole that the defendant intended to impute a charge of wilful murder, it is unnecessary for the plaintiff to assert, by way of innuendo, that the defendant meant to impute the very crime of murder (c).

*The mode of using these averments may be collected from the following instances.*

In an information against Clerk (d), for publishing a libel in "Mist's journal," it was shewn by proper averments and innuendos, that in a pretended piece of Persian history, the king, and several other members of the royal family had been libelled, and that the king was represented under the name of Mireweis, the queen under that of Sultana, and that the character of the young Sophi was intended for the pretender.

In Baxter's case (e), it was shewn, that by the word bishops, the bishops of England (f) were meant. In the King v. Franklin, that by "ministers," were meant the ministers of the King of England (g).

In an action for charging the plaintiff with having said,

(c) 1 Cowp. 275.

(f) 3 Bac. Ab. 454.

(d) Barnard, K. B. 304.

(g) 11 Mod. 99.

(e) 3 Mod. 69.

that he could see no probability of the war's ending with France, until the little gentleman on the other side of the water (innuendo the Prince of Wales) was restored to his rights, the court held, that this was certain enough even without an innuendo.

In Tutchin's case (*h*), the introductory part of the information stated, that the libel was written concerning the royal navy of this kingdom, and the government of the said navy. One part of the libel was, "The mismanagements of the navy" (innuendo the royal navy of this kingdom) "have been a greater tax upon the merchants than the duties raised by parliament." And it was holden, that "the navy" was well connected, by means of the innuendo, with the royal navy mentioned in the introductory part.

In the *King v. Mathews* (*i*) the information in the introductory part charged the libel to have been written "Of and concerning the Pretender, and concerning his right to the crown of Great Britain."

The words of the libel were, "From the solemnity of the chevalier's birth, and if hereditary right be any recommendation, he has that to plead in his favour." And it was holden, that the innuendo's in the body of the libel, explaining the words to mean the pretender, and his hereditary right to the crown of Great Britain, were, when connected with the previous averments, sufficient to verify the charge.

In the *King v. Horne* (*k*), the libel, as stated in the information, was averred to be of and concerning his said majesty's government, and the employment of his troops. The libel, as set forth in the information, advertised a subscription for "the relief of the widows, orphans, and

(*h*) 5 St. T. 528. 3 Ann.  
1704,

(*i*) 9 St. T. R. 682.  
(*k*) Cowp. 682.

aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, and preferring death to slavery, were, for that reason only, inhumanly murdered by the king's" (meaning his said majesty's) "troops, at or near Lexington and Concord, &c. in the province of Massachusetts." The defendant having been found guilty, objected, in arrest of judgment, that there was no averment as to the state of the Massachusetts colony at that time, or that the king had sent any troops there, or that the employment of the troops was by the king's authority.

Lord C. J. De Grey, in giving judgment, observed, "The words in the present case are, that the defendant, of and concerning the king's government and the employment of his troops, said, 'that innocent subjects had been inhumanly murdered by the king's troops, for preferring death to slavery.' Do these words import, in their natural and obvious sense, that the king's troops were employed by the act of government inhumanly to murder the king's innocent subjects? There can be no doubt but that the king's government comprehends all the executive power, both civil and military, that he employs all the national force, and that his troops are the instruments with which part of the executive government is to be carried on. The introductory part of this information charges, that the subject of the writing in the present case was, 'the troops, and the king's troops, and the business they had done'.

"It has been truly said, that the king's troops may, like other men, act as individuals, but they can be employed as *troops* by the act of government only. If the averment, therefore, amount to this, that in the discourse which was held, the words were said 'of and concerning the king's government,' the natural import appears to us to be this: 'I am speaking of the king's administration,

of his government relative to his troops, and I say, that our fellow subjects, faithful to the character of Englishmen, and preferring death to slavery, were, for that reason only, inhumanly murdered by the king's order, or the orders of his officers.' The motive imputed tends to aggravate the inhumanity of the act, and consequently of the imputation itself, because it arraigns the government of a breach of public trust, in employing the means of the defence of the subject in the destruction of the lives of those who are faithful and innocent."

"As to any other circumstances not stated in the information, if those which are stated, do of themselves constitute an offence, the rest supposed by the defendant, whether true or false, would have been only matter of aggravation, and not any ingredient essential to the constitution of the crime, and therefore not necessary to be averred on the record."

The *general rule* having thus been established, the *exceptions* to it are next to be considered.

And 1st. where the *means* are indifferent, provided the *end* be accomplished, such means may be described in general terms.

In the cases of high treason, of petit larciny, and of misdemeanors, which do not amount to felony, those who are not present when the fact is committed, but who previously advise, counsel, or by any means procure the commission of the crime, seem to be identified in every respect with those who actually perpetrate the offence, and may be described as principals in the indictment or information. But in all felonies, with the exception of petit larciny, one who is not either actually or constructively present, but who procures, by his solicitation, advice, or direction, the commission of the felony, is guilty, not as a principal, but as an accessory before the fact, and it is sufficient to aver, in general, that he *did*

130 INDICTMENT.—*Means and Manner.*

*incite, move, procure, and abet, &c. (l).* But then it is a well known rule of law, that an accessory cannot in general be convicted before the principal has been convicted, and it is usual and *proper* to charge the accessory in the same indictment with the principal (*m*).

And in such case, after describing the offence of the principal, it is sufficient to aver that the said C. D. did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command the said A. B. to commit the said felony.

Where the accessory is indicted after the conviction of the principal, it is not necessary, at common law, to aver in the indictment, that the principal committed the offence; it is sufficient to recite, with proper certainty, the record of the conviction; and this sufficiency is grounded upon the legal presumption that every thing in the former proceeding was rightly and properly transacted (*n*).

But where the indictment, under the statute (*o*), charges a person in one county, with procuring a murder to be committed in another, it should not merely recite that the principal was indicted in the other county, because that is no express allegation that the principal committed the murder; but it should aver, that the principal did commit the murder in the other county (*p*). And in such case the indictment should first describe the offence to have been committed by the principal, in the same form as in an indictment against the principal, only lay-

(*l*) *Sanchar's case*, 9 Co. 114.      ture deliberation, and is said

(*m*) *Fost.* 365.      to have been authorised by

(*n*) *Ib.*      many precedents. See also

(*o*) 2 & 3 E. 6. c. 24.      the case of the Earl and Countess of Somerset, 1 St. Tr. 351.

(*p*) *Lord Sanchar's case*, 9 Co. 114. where this point seems      3 Ins. 49.

to have been decided upon ma-

ing it in the *second county* (*q*) according to the fact, and should then proceed to aver that the accessory, on, &c. at, &c. the said R. C. to do and commit the felony and murder aforesaid, in manner and form aforesaid, maliciously, feloniously, voluntarily, and of his malice aforethought, did stir up, move, abet, counsel, and procure against the peace, &c.

If A. command B. to commit a felony, and B. associate C. with himself in the commission of the felony (*r*), it is proper to charge A. as accessory to B. only; but if he be charged as accessory to B. and C. he may be convicted on proof that he was accessory to B. alone (*s*). A man may be both principal and accessory to the same felony; as if A. command B. to kill C. and afterwards assist him in the fact, he may be so charged in the indictment (*t*). And if A. command B. to commit a robbery, and B. procure it to be committed by the agency of D., A. also is an accessory before the fact; and in such case it seems, that A. may be indicted directly as accessory to D. (*u*). In case of felonies, created or punished by particular statutes, accessories before the fact are frequently described by particular words which ought to be used in framing indictments against them. Yet it has been holden (*x*), that an indictment against one, as accessory before the fact to a murder, which alleged that he did maliciously excite, move, and procure, was sufficient to oust the offender of his clergy, under the stat. 4 & 5

(*q*) 3 Ins. 49.

(*t*) 2 Haw. c. 29. s. 1. 7 H.

(*r*) *Ld. Sanchar's case*, 9 Co. 4. 27. F. Coron. 80. 176. 285.

114. See the case of *M'Daniel* (*u*) *Fost.* 125. 361. 9 Co.

and others. *Lord and Lady Somerset's case*, 1 St. Tr. 351. 2 114. 3 Ins. 49.

(*x*) *Lodowike Grevil's case*,

*Haw. c. 29. s. 51. Fost. 125. And. 195. Fost. 130.*

(*s*) *Lord Sanchar's case*, 9 Co. 114.



Ph. & M.; the words of which are, "maliciously command, hire, or counsel," since the counselling of another is necessarily included in the exciting, moving, and procuring. And Mr. Justice Foster approved of the decision (y), although he observes, that it is the only precedent he knew, in which the words of the statute had been totally dropt; and he said, that he the rather *inclined* to that opinion, because the legislature, in statutes made concerning accessories before the fact, have not confined themselves to any certain mode of expression, but have used a great variety of words all terminating in the same general idea.

In the above class of cases, where the solicitation has been followed by the consummation of the crime, no doubt seems to have been entertained as to the sufficiency of a description by means of the general words above alluded to.

This sufficiency rests upon two grounds: in the first place, the adequacy of the means of procurement, is a *mere question of fact* for the cognisance of the jury, and since *any means* are sufficient to render the procurer criminal, it would afford no further information to the court to set them out.

Thus, if A. procure B. to murder C. it is perfectly immaterial whether he effected his purpose by working upon one passion or another, whether he stimulated his avarice or incited him to revenge; whatever mode of persuasion he adopted, he would still be a procurer, and the stating the means upon the record would still leave the question entirely to the consideration of the jury, whether the defendant did procure or not, a fact conclusive as to the adequacy of the means. In the second place, since the means of persuasion and soli-

citation must frequently be of a complicated nature, it would lead to great inconvenience and prolixity if they were always to be described upon the record.

In the preceding class of cases, the end is supposed to have been accomplished; but frequently the offence consists in the mere solicitation, or other attempt to procure the commission of a crime, which is not afterwards perpetrated; and here, since the offence rests in *tendency* only, a greater degree of particularity appears to be necessary in stating the *means*, for by those alone can the defendant's criminality be tried, since their adequacy is not shewn on the record by an averment that they did produce the criminal effect.

And in general, in case of libel, as has already been seen, the instrument itself must be set out in the indictment.

So in the case of a threatening letter, or the speaking of blasphemous or seditious words (*y*), which fall within the rule as laid down by the judges in Sacheverell's case. And the same general reason applies to all these cases: the means must be set out to enable the court to determine, whether they could constitute the offence imputed; since what amounts to a libel, what constitutes a threatening letter under the statute, what words are punishable

(*y*) Under the st. 6 & 7 W. 3. c. 11. it was necessary, in a conviction, to set forth the particular oaths and curses used; but in the stat. 19 G. 2. c. 21. a general form is given, which renders it unnecessary to set forth the particular words. In indictments against defendants for neglecting to take the oaths of allegiance, &c. it has frequently been holden necessary to insert the oaths neglected to be taken; but the reason of this nicety is not very obvious, all that appears to be essential, is to specify the particular oath omitted to be taken.

as being blasphemous and seditious, are questions of law, and ought, in every case, to undergo a judicial examination.

There are, however, many instances in which, though the crime rest in *tendency* only, it may be described by general words, without specifying the means; this happens when the offence is a conclusion of fact arising from a variety of circumstances incapable of any precise definition. These, therefore, are to be regarded as exceptions to the general rule, from the necessity of the case.

It seems formerly to have been holden, that a mere solicitation, not followed by any act, was not an indictable offence.

In the case of the Queen v. Daniel (z), who was indicted for procuring, enticing, persuading, and causing an apprentice to depart from his master's service, Lord Holt held, that the advising one to rob or kill, without something done thereon, would not be indictable, though it might be otherwise of a conspiracy to rob or kill. But the same learned judge seems, in some degree, to have changed his opinion the same term, for he is reported to have intimated, on the last day of that term, that he was not satisfied whether to entice an apprentice to leave his master was an indictable offence; but that to persuade him to embezzle his master's goods was indictable. Yet it appears, on the the face of the report, that even in the latter case he was doubtful whether it was not necessary to allege that the apprentice had embezzled the goods (a). And in the subsequent case of the Queen v. Collingwood (b), the court were

(z) 6 Mod. 101.

2 Ld. Ray. 1118. See R. v.

(a) Ib.

Sutton, Str. 92. and Vin. Ab.

(b) 6 Mod. 289. 3 Salk. 42. Ind. A. 4.

of opinion, that an enticement is not criminal without *something* done in pursuance of it.

But in the case of the King v. Lady Lawly (*b*); the indictment charged that the defendant, knowing that J. C. was indicted for perjury, *endeavoured* to keep away a material witness for the king, on which there was judgment for the crown.

In the case of the King v. Schofield, the attempt of the defendant to set fire to his own house was holden to be a misdemeanor (*c*). And a case was cited which had been tried before Baron Adams, at Shrewsbury, where the indictment charged the defendant with an attempt to suborn one to commit perjury, which, upon reference to the judges, was unanimously holden to be a misdemeanor. So it was ruled in Johnson's case, where the defendant solicited a witness to commit perjury (*d*).

So in the case of the King v. Plympton (*e*), the promising money to a member of a corporation to induce him to vote for the election of a mayor, was holden to be indictable.

So in the case of the King v. Vaughan (*f*), an indictment was supported against the defendant for attempting to bribe the Duke of Grafton, who was then a cabinet minister and a member of the privy counsel, to give the defendant a place in Jamaica.

In a recent case, R. v. Higgins (*g*), the defendant was charged with the *soliciting and inciting* of one I. D. a servant of J. P. to take, embezzle, and steal, a quantity of his master's goods; and, after conviction, it was objected for error, that no offence was sufficiently alleged

(*b*) Fitzgib. 263.

(*c*) Cald. 397.

(*d*) 2 Show. 1.

(*e*) 2 Ld. Ray. 1377.

(*f*) Burr. 2494.

(*g*) 2 East, 4.

on the face of the indictment; and it was contended, that a mere intent to commit a crime, was not indictable; and an attempt was made to distinguish the case from some of those above cited, on the ground that no act had been done in pursuance of the unlawful intent; and many cases were quoted for the purpose of shewing, that a mere intent without any act was not indictable; but the court held, that this argument was a mere fallacy, for that the solicitation itself was an act. And Lawrence, J. said, that he had seen similar indictments,—one of the *King v. Broom*, in Northumberland, when at the bar, and another against Guy, and another drawn by Mr. Justice Ashurst for soliciting one to kill the Chevalier D'Eon.

With respect to the description of the *solicitation or endeavour*, it seems that general words are sufficient, because the *endeavour, attempt, or solicitation*, is in general made up of a number of petty circumstances, which cannot be set out on the record.

Therefore, though some of the old indictments for endeavouring to suborn, state an offer of money (*h*), yet it has been deemed sufficient to charge an endeavour to suborn generally, without stating the means. So in an indictment for endeavouring to keep away a witness (*i*).

Tilley (*k*) was indicted under the stat. 16 G. 2. c. 31. against “aiding and assisting prisoners to attempt to escape out of lawful custody:” the indictment stated, that the defendants were aiding and assisting one Isdaile Idswell, then and there being a prisoner, &c. After conviction, though a motion was made in arrest of judgment, on account of an informality in the indictment, it was not ob-

(*h*) Trem. P. C. 168, 174.      (*k*) Tilley's case, Leach,

(*i*) Fitz. 263. See also Ld. 759,

Ray. 1377.

jected that the means used by the defendants, in aiding and assisting, ought to have been specified.

So under the stat. 23 G. 3. c. 13. against enticing artificers out of the kingdom, it is sufficient to aver, generally, that the defendant did contract with a certain artificer to go out of this country, (*l*) &c.

The defendant Fuller (*m*) was indicted under the stat. 37 G. 3. c. 70. which enacts, that "any person who shall maliciously and advisedly *endeavour* to seduce any person or persons serving in his Majesty's forces, by sea or land, from his or their duty and allegiance to his majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make, or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practices, &c. shall, on being legally convicted of such offence, be adjudged guilty of felony without benefit of clergy."

The first count in the indictment averred, that the defendant did feloniously, maliciously, and advisedly *endeavour* to seduce Matthew Lowe, he the said Matthew Lowe then and there being a person serving in his Majesty's forces by land, from his duty and allegiance to his said majesty. The second count stated, that he did feloniously, maliciously, and advisedly, *endeavour* to incite and stir up the said Matthew Lowe, he the said Matthew Lowe then and there being a person serving in his said majesty's forces by land, as aforesaid, to commit an act of mutiny, and to commit traitorous and mutinous practices. After conviction, it was moved, in arrest of judgment, that the indictment ought to have stated *the means* by which the prisoner had endeavoured to seduce Matthew Lowe from his duty and allegiance, as charged in

(*l*) Myddleton's case, 6 T. R. 739.

(*m*) R. v. Richard Fuller, Leach, 916.

the first count, and to incite him to commit an act of mutiny, and traitorous and mutinous practices, as charged in the second count; but the judges were unanimously of opinion, that the case was similar to those of indictments for conspiracies, where the offence is holden to be sufficiently described by the words, “conspire, maintain, aid, and abet,” without shewing in what manner, and by what means, the conspiring, maintaining, aiding, and abetting were produced; and that, as an endeavour to seduce, to intice, and to stir up, is a conclusion of fact arising from a variety of circumstances, which in itself is not capable of any precise definition or description, the fact is fully and only capable of being expressed by the word *endeavour*.

It is to be remarked, that the preamble of the statute, upon which the indictment was founded, recites, that “divers wicked and evil disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, had of late industriously endeavoured to seduce persons serving in his majesty’s forces, by sea and land, from their duty and allegiance to his majesty, and to incite them to mutiny and disobedience.” And yet the indictment did not, in either count, specify whether the endeavour was made by these means, or by either of them.

In the case of the *King v. Higgins* (n), above alluded to, the indictment charged, that the defendant did solicit and incite one James Dixon, a servant of J. Phillips, to take, embezzle, and steal, a quantity of twist, of the goods and chattels of his master; and, upon this indictment, the judgment of the court below was affirmed upon a writ of error.

Where a defendant is indicted for a misdemeanor, committed by the soliciting another to do that, which, if done, would amount to a felony, and render the defen-

(n) 2 East, 5.

dant, as an accessory before the fact, also guilty of felony, it is unnecessary to negative the commission of the felony, for it cannot be intended that a felony(o) has been committed where none is charged.

IV. *Offences consisting of misconduct in office; as by extortion, or other breach of duty, &c.*

In an indictment against a person, or body of persons, for misconducting themselves in office, whether the offence consist in misfeasance or nonfeasance, it is essential to set forth the particular instance of misconduct, with its circumstances. Hence it is insufficient to allege against a constable, generally (p), that he conducted himself improperly and negligently in the execution of his office. In the case of the King against Hollond and others (q), who were officers in the service of the East India Company, the indictment charged them with malversation in office; one count set forth a letter, requiring them to commence and prosecute war against Tippoo Sultaun with all possible vigour and decision, and then alleged, by way of breach, that the defendant Hollond did not commence and prosecute war against Tippoo Sultaun with all possible vigour and decision. The court, upon demurrer, held, that this count was defective, because it did not communicate to the defendant what was meant to be proved against him upon the trial.

And the court, in the same case, were of opinion, that every fact material to constitute guilt, should be alleged with averments of *time* and *place*.

Where an officer, under colour of his authority, extorts money or other property, it seems proper to set out the circumstances with a considerable degree of precision; for though in Cover's case (r) it was holden,

(o) *R. v. Higgins*, 2 East, 5.

(q) 5 T. R. 607.

(p) *R. v. Winteringham*,

(r) Sid. 91. Keb. 357.



that an indictment, alleging generally that the defendant extorted a sum of money *colore officii*, was sufficient after verdict, yet this was afterwards denied by Lord Holt to be law; for a verdict cannot render a charge more extensive, and, consequently, cannot cure a defect of that nature. It appears to be necessary, or at all events advisable, in an indictment of this kind to aver, that the defendant, being such officer, *took and received* a specified sum of money, or other property, into his own possession; for merely to say, that he compelled a party to pay or deliver it, does not seem to be sufficiently certain (*x*). And to aver that he took it under *colour of his office* and *extorsively*; for Lord Holt and some of his brethren were of opinion, that the word *extorsive* was as essential in that offence as *proditorie* in treason, or *felonice* in felony (*y*). Yet in actions against officers, to recover penalties for taking greater fees than are by law allowed, it does not seem to be essential to introduce the word, unless it be used in the statute. And likewise to aver for what he took it, as that, being a gaoler, he took it for charging A. B. a prisoner in his custody, with an action at the suit of J. S. brought to recover, &c. (*z*); for shewing ease and favour to A. B. a

(*x*) *R. v. Baines*, 2 Ld. Ray. 1265.

(*y*) *Salk.* 680. Ld. Ray. 1265.

(*z*) In the case of the King *v. Broughton*, Trem. P. C. 111. the indictment alleged, that the defendant being keeper of the king's prison of the gatehouse, at Westminster, under colour of her office, unlawfully, unjustly, and extorsively, ex-

acted, received, and took the sum of 2s. 4d. from E. O. for charging A. H. with an action at the suit of E. O. for the sum of 200l.

And in another count, that the defendant unlawfully, unjustly, and extorsively exacted, received, and took, &c. from one H. M. the sum of two guineas, for ease and favour, and for relieving one B. D. from

prisoner in his custody (a); for executing his duty as coroner (b); for writing the probate of a will, (c) &c.; and this appears to be necessary, whenever the indictment is founded on a statute which interdicts the taking of fees by an officer for the performance of a particular duty, or which limits the amount of his fee. And in other cases, where it can be clearly shewn under what pretence the money was extorted, it seems to be proper to aver it. But notwithstanding the dictum attributed to Lord Holt in *Salkeld* (d), it does not appear to be in all cases essential to set forth the pretence.

For besides the authority of *Cover's case*, as reported in *Siderfin and Keble* (e), it appears, that in the very same term the case of the *King v. Atkinson* (f) and another was decided in the Queen's Bench. The indictment alleged, that the defendants, being collectors of several sums assessed upon the inhabitants of, &c. by *colour of their office*, exacted, received, and had, of one T. C. of L. the sum of 4*s.*, without alleging, that they pretended that such sum had been assessed upon them. The defendants demurred, and contended that the indictment was vicious for a misjoinder, but the objection was overruled; and it was never contended, that the indictment ought specially to have alleged the pretence. So there is a precedent in *West* of an indictment against an escheator's servant, which alleges *generally*, that he broke and entered a certain dwelling-house, and under colour of his office seized and carried away certain skins against

his irons, being then a prisoner in the said prison, and in the custody of the said defendant, detained for a felony and murder by the said B. D. lately and then supposed to have been committed.

(a) *R. v. Broughton, Trem.*

111.

(b) *West. Pr. sec. 108, 109.*

(c) *West. Pr. sec. 111.*

(d) *R. v. Baines, Salk. 680.*

(e) *Sid. 91. Keb. 357.*

(f) *Ld. Ray. 1248.*

142 INDICTMENT.—*Means and Manner.*

the form of divers statutes (e). And whenever the extortion is effected by means of a general assertion, that the sum is due to the officer in respect of his office, the means must of necessity be generally alleged in the indictment. And the distinction seems to be between those cases where the extortion may be committed generally, and those where the taking is prohibited by a statute in respect of some particular duty; for, in the latter case, it is of course essential to shew that the demand was made in respect of that duty: and, therefore, in Lindly's case (g), in an information against the defendant, who made an extortionate demand for making a warrant upon a *capias ad satisfaciendum*, it was holden to be insufficient to aver, that he did it *colore officii*, and that it should have been shewn to whom the *capias* was directed, &c.

Finally, it should be shewn, with certainty, *how much* was extorted. In the report of Baynes's case, in Salkeld (f), Lord Holt, and the six justices who agreed with him, held, that the charge should have been, either that 3s. was his fee, and that by colour of his office he took 8s. or generally, that by colour of his office, he extorsively took 8s.

And in most of the precedents of indictments for this offence, it is either averred, that nothing was due to the defendant, or as in the case of Atkinson and another above alluded to, that the defendants, being collectors of certain sums assessed, exacted, &c. from one T. C. being in no wise assessed by virtue of the act of parliament aforesaid (h). But where the taking is manifestly unjust and

(e) West. Pr. sec. 110. and  
see R. v. Lake, 3 Lev. 268.

(f) Salk. 680.

(g) Hutt. 70.

(h) See also West's Pr. s.  
108, 109. R. v. Broughton,  
Trem. 111.

unlawful, as where the taking any fee for performing a particular duty is wholly prohibited by a statute, it does not appear to be essential to aver that nothing was due, because the law will intend it (*i*).

But where the officer is entitled to one fee, and extorts a greater, then the indictment ought to shew the excess in which the extortion really consists; for, where something is really due, it seems to be improper to allege, that the *whole* was wrongfully extorted, and since, according to a well-known rule in pleading, the extent of the offence ought to be shewn, it appears to be necessary to allege, how much was really due, and how much the defendant took (*k*); and, in such case, it seems that a variance upon the trial would not be material, provided it were shewn that the sum actually taken exceeded that alleged and proved to be allowed by law (*l*).

And this rule extends to all cases of illegal imposition or exaction: thus, in the case of the *King v. Flint* (*m*), the indictment against the defendant, for making loaves of unlawful weight, alleged, "*debitum pondus minime habens*;" and it was holden to be insufficient, for not shewing what the *debitum pondus* was, and how much was wanting.

Of a nature similar to the last, is the offence of a private person who extorts money by threat of legal process. In the case of the *King v. Southerton* (*n*) it was holden, that the threatening by letter, or otherwise, to prosecute for penalties under a statute, for the purpose of obtaining

(*i*) See also *West's Pr. s.* 108, 109. *R. v. Broughton*, *R.* 265. and *R. v. Baynes, Ld.* Trem. 111. and *R. v. Loggen* Ray. 1265. *West. Pr. sec.* 111. and another, *Str.* 73. (*m*) *Salk.* 687. *Ld. Ray.* 442.

(*k*) *R. v. Baines, Salk.* 680. (*n*) 6 *East*, 126. See also *R. Ld. Ray.* 1265. *R. v. Loggen*, *v. Woodward*, 11 *Mod.* 137. *Str.* 73. *R. v. Lake*, 3 *Lev.* 262.

money to stay the prosecution, was not an indictable misdemeanor at common law, although the indictment alleged that money was actually obtained, but that the offence was indictable under the statute.

It has already been seen, that in an indictment for sending a threatening letter, which is a capital offence, whether money or valuables be extorted by it or otherwise, the letter itself must be set out, to (o) enable the court to judge whether the letter is within the statute. But with respect to other attempts to extort or exact, it does not seem to be essential to set forth the words in which the illegal demand was made.

In case of a criminal omission to perform a duty, it is necessary to set out the circumstances of the default; as in an indictment against a parish for not repairing an highway, or against a county for not repairing a bridge, it is necessary, by proper averments, to shew where the highway or bridge are situated, and that they are in an unfit state to be used by the public; and it has been holden necessary, in indictments for not repairing an highway, to state the extent of the evil complained of, by setting forth the length and breadth of the road out of repair (p).

#### V. *Illegal Combinations and Conspiracies.*

In an indictment for a conspiracy it is usual to allege, that the defendants unlawfully and wickedly did conspire, combine, confederate, and agree together, to effect the criminal design; and afterwards to allege, that the said defendants, in pursuance of the said conspiracy, combination, confederacy, and agreement, did certain acts set forth in the indictment (q). And in such cases it

(o) Girdwood's case, Leach, (p) 1 Haw. c. 26. s. 88. Cas. 169. R. v. Loyd, East. P. C. temp. Hard. 106. 316.  
976.

(q) R. v. Rispal, Burr. 1320.  
1 Salk. 174. Holt, 151.

seems, that the general averment that the defendants did *conspire*, &c. to accomplish an object *apparently criminal*, is sufficient, without shewing in what manner and by what means (b) the conspiracy, &c. was produced. And since it is the *conspiring* which the law regards as criminal, the offence is complete and consummate by conspiring, though no act should be founded upon it (c); and, therefore, in strictness, it is unnecessary to allege any overt act done in pursuance of the criminal design (d). But since the conspiracy itself, (to use the words of Mr. J. Grose,) (e) is a matter of inference deduced from criminal acts, done in pursuance of an apparent criminal purpose in common between the defendants, and therefore the indictment for a conspiracy bears a resemblance to an indictment for treason, it is, at all events, proper to allege one or more overt acts done in prosecution of the confederacy on which the indictment is founded.

In an indictment for conspiring to charge a man with any offence, it is not necessary to allege, that the defendants conspired *falsely* to indict the party, for his innocence will be presumed till the contrary appear (f); and for the same reason, the indictment need not allege that the party is innocent (g).

*But unless the object of the conspiracy be criminal, it seems necessary to shew, that it was intended to accomplish it by some improper means.*

Thus, it is necessary, in an indictment against overseers

(b) Per Perryn, Baron, in Kel. 203. 254. 27 Ass. pl. 44. delivering judgment in Fuller's case, 16 Ass. pl. 62.

(c) Leach, 924.

(e) R. v. Brisac and Scott,

(c) Salk. 174.

4 East, 171.

(d) Salk. 174. 1 Vent. 304.

1 Sid. 174. 1 Lev. 125. 62. 993.

(f) 1 Salk. 174. 2 Burr.

(g) 1 Salk. 174.

and others, for conspiring to marry paupers, in order to rid the parish of the burthen of maintaining them, to shew that it was brought about by illegal means, by violence, threats, or some other sinister means, promises, or bribe, without the voluntary consent or inclination of the parties themselves (*h*). For since the act of marriage is in itself lawful, a conspiracy to procure it can only amount to a crime, by the practice of undue means; and this is said to have been frequently ruled by the judges (*i*). But where the indictment stated, that the marriage was procured by threats and menaces, it was holden to be sufficient, without averring it in terms to have been against the will or consent of the parties, though that should be proved upon the trial (*k*). But in these cases, the question which has been chiefly considered, is, whether the marriage would effectuate that intention usually charged upon the defendants, viz. to exonerate their own parish; and to throw the burthen upon another.

In the case of the King *v.* Edwards (*l*) and others, judgment was arrested upon an indictment for conspiring together, and giving the husband money to marry a pauper, who was an *inhabitant* of B. in order to defeat her settlement in that parish, because it was not averred, that she was last legally settled in B. And it has been holden necessary in such an indictment to allege, that the husband was a poor person, and unable to maintain himself and his wife (*m*).

In Tremayne's Pleas of the Crown (*n*) is a precedent

(*h*) Per Buller, J. *R. v.* Fowler and others, East. P. C. 461. (*k*) *R. v.* Parkhouse, &c. cited, East. P. C. 462.

(*l*) 8 Mod. 320.

(*i*) *R. v.* Parkhouse, &c. cited, East. P. C. 462. (*m*) *R. v.* Tanner, 1 Esp. 304.

(*n*) p. 97.

of an indictment against Allibone and others, for conspiring to persuade one Hilliard to marry a woman much in debt, by *representing her to be a woman of great property*, and afterwards to induce the said Hilliard to execute bonds to a stranger.

Also a similar indictment (o), for conspiring to marry a rich infant, of the age of 13 years, to the daughter of one of the defendants, and to effect their purpose by *representing to the young man that the daughter was very rich, and by threatening to transport the daughter, unless she complied*. And another precedent of the same kind (p), for a conspiracy to bring about a marriage between a rich heir and a woman of bad character, by *representing her as of good character and large property*. And, therefore, unless the object of the conspiracy be manifestly criminal, it seems that the means should be shewn to be unlawful.

In a conviction under the stat. 39 & 40 G. 3. c. 106. against illegal agreements by journeymen manufacturers, the court held it to be essential that the agreement should be stated; because it is necessary to shew a criminal object, as well as a criminal intent (q).

But, by the express provision of the statute 37 G. 3. c. 123. against the administration, &c. of unlawful oaths and engagements, it is unnecessary to set forth the words of such oath or engagement in the indictment; but it is sufficient to set out the purport, or some material part of it (r).

Of a nature similar to the offence of conspiracy is that of unlawful maintenance, which may be described by the general term *manutenuit*, without descending to the particular means employed.

(o) Trem. P. C. 98.

(q) R. v. Neild and others,

(p) Trem. P. C. 99.

6 East, 417.

(r) s. 4.



148 INDICTMENT.—*Means and Manner.*

In Tremayne's Pleas of the Crown, there is an indictment for maintenance, which in the marginal note is stated to have been drawn by Saunders, which avers generally, that the defendant for one whole year unlawfully maintained a certain plea pending in the Court of Exchequer, &c. (*s*); though in some precedents it is also averred, that the defendant, in and for the maintenance of the said suit, expended divers sums of money (*t*).

(*s*) Trem. P. C. 177. R. v.      (*t*) R. v. Langrish, Trem.  
Price. See also Sav. 41. Co. P. C. 176.  
Ent. 163.

## CHAP. VIII.

*Of the Averment of Circumstances collateral to the Act or Omission, which render that Act or Omission criminal.*

- I. *Situation or Character of the Defendant*, p. 150.
- II. *Situation of others*, p. 155.
- III. *Other Circumstances collateral to the principal Act, negative Averments, &c.* p. 159.

SINCE it is of the very essence of an indictment to specify the nature of the crime charged upon the defendant, it may be laid down as a general rule, that the criminal nature of the act must appear upon the face of the indictment, and that if the act or omission be not in itself illegal, it must be shewn to be so from the particular circumstances of the case, which cannot be supplied by any intendment whatsoever (*a*).

Thus, an indictment charging a man with a nuisance in respect of a fact which is lawful in itself, as the erecting of an inn, and which only becomes unlawful from collateral circumstances, is insufficient, unless it set forth some circumstances which make it unlawful (*b*).

The criminality of an act, in itself innocent, may arise either from the *situation* or *knowledge* of the defendant himself, or from that of *others*, or from *other particular*

(*a*) 2 Haw. c. 25. s. 57.

(*b*) 2 Roll. Rep. 345. Pal.  
368. 374.

*circumstances* contained in the definition of the offence.

*I. From the situation or character of the defendant.*

Where the offence consists in the omission of some duty which the law throws upon the defendant, the indictment must always shew the defendant's liability to perform such duty, unless it appear by a necessary implication of law; and in some instances must specify the circumstances which created the duty, with great precision.

Thus, in an indictment against a parish for the non-repair of an highway, or against a county for not repairing a bridge, it is sufficient to allege that the road is out of repair, or the bridge in decay; because the parish and county are severally bound, by the law, to the performance of such duties, and therefore an express averment of their obligation is unnecessary. But if a private person be indicted for not repairing a road, it must be shewn that he was under a legal obligation to repair it by reason of his tenure or otherwise (*c*). So where the inhabitants of a particular division of a parish are indicted for the non-repair of a road, since the obligation must arise from custom or prescription, and does not exist at common law, the indictment must shew the custom, prescription, or reason by which they are bound (*d*).

An indictment set forth that the defendant being qualified to be constable, was *debito modo electus* to serve that office, at Islington, and that he had notice of it, but did not take the oath to execute that office. It was objected that the indictment did not set forth that the defendant had been chosen by one having sufficient autho-

(*c*) 1 Vent. 331. 1 Str. 187.      Broughton, 3 Keb. 301. 3 Bac.

(*d*) 5 Burr. 2700. R. v.      Abr. 58. 2 T. R. 111. 518.

rity, and that it did not appear how he was chosen, and whether he had had notice, and for this exception the indictment was quashed (*e*).

So an indictment for not receiving an apprentice is bad, unless it appear, on the record, that there was a binding within the 23d of Elizabeth, for otherwise it would not appear that the defendant acted illegally in refusing to take the apprentice (*f*).

So an indictment for a contempt in not executing a warrant, ought to set forth the nature and tenor of the warrant (*g*).

*How averred.*

Where it is necessary to aver the situation or character of the defendant at the time of the act or omission, it seems to be settled that it is sufficient to aver that he *being such* did the act (*h*).

An information under the statute (*i*) which enacts, that if any person, &c. above the age of 14, shall unlawfully take a maid or woman unmarried, &c. charged, that the defendant, *being* above the age of 14 years, did take a young maid away, &c.; it was moved, in arrest of judgment, that the information did not aver that the defendant was above the age of 14 years at the time of taking, but only that he *being* above the age of 14 years, did take. But the court held that the information was good, and distinguished between the case where the *existence* is added to the person acting, and where it is applied to the subject of the act; that if an indictment for

(*e*) 5 Mod. 96. Comb. 328. (*h*) 2 Haw. c. 25. s. 112.  
See R. v. Burder, 4 T. R. Cro. J. 610. 2 Mod. 128.  
778. 2 Roll. Rep. 286. Moor, 606.  
(*f*) Str. 1268. R. v. Trevilian. 2 Lev. 229. Ray. 578. Keb.  
852.  
(*g*) 1 Vent. 305. (*i*) 4 & 5 P. & M. c. 8.

a forcible entry should aver that the defendant on such a day, with force and arms, did enter into such a house, being the freehold of J. N. without saying, *then* being the freehold, the indictment would be bad; but that in the principal case the *existens* being added to the person, carried the sense to the time of the offence committed (*k*).

So if a man be indicted for not coming to church, it is sufficient to say that *existens* of the age of 16 years, he did not come to church (*l*).

And it seems to be a general rule, that where the criminality of the act or omission arises from the particular situation of the party, which operates as a disqualification, it is unnecessary to aver that disqualification with circumstances of time and place (*m*).

So in an indictment against a defendant for misconduct in a particular office or situation, it is sufficient to allege, generally, that he was in such an office or situation at the time. In the case of the *King v. Hollond* (*n*), the indictment stated that he was a counsellor in the room and place of R. M. during the period in which certain malversations in office were alleged to have been committed by him; but the court held that the allegation was sufficient, and observed, that in criminal prosecutions, and actions against justices of the peace and clergymen, for any offences committed by them in their respective situations, constant practice had settled that, as against them, the exercise of their office is proof of their obligation.

*From the criminal knowledge of the defendant.*

Where a particular knowledge on the part of the

(*k*) *R. v. Moor*, 2 Mod. 128.      (*n*) 6 T. R. 623. and per  
2 Roll. 126.      Buller, *J. Berryman v. Wise*,

(*l*) 2 Mod. 130.      4 T. R. 366.

(*m*) 2 Haw. c. 25. s. 84. 112.

defendant renders what he did criminal, the fact of his knowledge must be expressly averred (*n*). And this important averment is the principal one in a very large class of offences, comprehending all accessories after the fact, all utterers of forged notes and counterfeit money, &c. for in such case the very essence of the crime consists in the guilty knowledge of the defendant.

Staundforde, speaking of indictments against those guilty as accessories in receiving felons, after laying it down as a general rule, that the indictment must state the *manner of the felony*, and the *knowledge* of the party receiving the felon, excepts the case where the felon has been attainted in the same county, for then he says it is not necessary to make mention of the manner of the felony (*o*), for it is sufficient that he was attainted, though the attainder be erroneous; in which case it was not lawful for any one to receive him, for every one is bound to take notice of this attainder, which is matter of record in the same county. But this doctrine seems to have been materially contradicted (*p*).

Lord Hale says, "I never thought that opinion of Staundforde to be law, that the receipt of a felon after attainder in the same county, made a person accessory without notice, because he is bound at his peril to take notice that he was attainted; for it oftentimes lies as little in the knowledge of many persons who are convict of felony or treason, as whether a man be guilty of it (*q*)."

And Lambard (*r*), in commenting on this doctrine, observes, "Bracton very reasonably requires a right and direct knowledge in the parties, to make them accessory in the one case as well as in the other, for albeit a record,

(*n*) 2 Haw. c. 25. s. 66, 67.

(*o*) Staun. 96. 8 E. 4. f. 3. 355.

(*p*) 3 P. Wms. 494.

(*q*) 1 Hale, 323. Vide Dyer,

(*r*) p. 293.

and especially the pronouncement of an outlawry, be so notorious, that every man may easily come to know the same; yet were it an over great extremity that each man should, at the peril of his own life, inform himself and take understanding of it."

And Lord Hardwicke, in the case of the King *v.* Beridge (*r*), observes, the reasoning of Lambard appears to be very judicious, and upon the whole of this point we all think that the true way of understanding these books is, that an outlawry or attainder in a particular county may, as the case may happen to be circumstanced, be some evidence of notice to an accessory in the same county; but that it cannot, with any reason or justice, create an absolute legal presumption of notice, so as to excuse the not charging the fact to be done *scieus* or *scienter*, in the indictment.

In an indictment for carrying a person, ill of the small-pox, from one parish to another, it was holden to be necessary to aver that defendant *knew* that the party so carried had the small-pox (*s*).

And in general, wherever a statute makes a guilty knowledge part of the definition of an offence, the knowledge is a material fact which must be expressly averred (*t*). But where a statute prohibits generally, and is silent as to intention, it appears clear that a pleader need not aver knowledge upon the face of the indictment; how far, in such case, proof that the defendant's mind was free from all guilty knowledge, would go towards his exculpation, is a question which need not here be considered (*u*).

Therefore, under the stat. 23 G. 3. c. 13. against seduc-

(*r*) 3 P. Wms. 496.

(*s*) Andr. 162.

(*t*) R. v. Jukes & al. 18 T.

R. 536.

(*u*) See R. v. Bell, Fost.

ing artificers, it is unnecessary to allege that the defendant knew the person to be an artificer (*u*).

*How the knowledge must be averred.*

No express form of words is essential to this averment. It has been holden, that an indictment averring that J. S. *scienter receptavit* such a one being a felon, was insufficient, for want of an express averment that J. S. knew the person, so received by him, to have been a felon (*x*). But this, as observed by Serjeant Hawkins, is contradicted by a number of later decisions, in which it has been holden, that the word *scienter*, in such a case, shall be construed to go through the whole sentence (*y*).

Upon an indictment for attempting to seduce a soldier, under the stat. 37 G. 3. c. 70. (*z*) it was holden that the word *advisedly* contained a sufficient averment of knowledge; and it was holden, in the same case, that an averment of knowledge is virtually included in the averment that the defendant *endeavoured* to seduce (*a*).

*II. From the situation of others.*

An indictment charging a constable with having voluntarily and feloniously suffered a person arrested by him, on suspicion of felony, to escape, without shewing what the nature of the felony was, and that it was actually committed, is void, both for want of shewing that any offence had actually been committed by the person arrested, and also for not specifying what the felony was; for, unless the arrest were for a felony, the suffering the escape would not be felonious (*b*).

(*u*) R. v. Myddleton, 6 T. R. 739.      (*z*) R. v. Fuller, Leach, 916.

(*x*) 7 H. 6. 42.      (*a*) *Ib*.

(*y*) 2 Haw. c. 25. s. 67. 2      (*b*) 2 Haw. c. 25. s. 66.  
Lev. 208. 8 Ed. 4. 3. Str. 73.      Cro. Eliz. 752. Str. 12. 26.  
904.      1268. 3 P. Wms. 497. 3 H.  
6. f. 2.



So in an indictment for a rescous, the indictment ought to shew, that the party rescued was in legal custody, and, as it is said, should set out the writ and warrant (b).

A prisoner was indicted, under the stat. 10 G. 2. c. 31. for having conveyed instruments into the prison of the Poultry Compter, with intent to aid and assist the escape of Henrietta Lake, he well knowing the said Henrietta to have been lawfully committed to the said prison, *upon suspicion* of forging a promissory note of 100*l.* with intent to defraud one Elizabeth Whitelock, &c. The act on which this indictment was founded, makes the offender guilty where the prisoner "was committed to, or detained in, any gaol, for treason or felony expressed in the warrant of commitment or detainer." The judges were unanimously of opinion, that a commitment upon suspicion essentially differed from a commitment for treason or felony clearly and plainly expressed, which can never be the case where the commitment is upon *suspicion* only (c).

An accessory after the fact can only become so from his criminal conduct in respect of another, who has before that time committed a felony (d). The charge, therefore, against a criminal of this description, consists of two parts: first, of the *felonious situation* of the principal, and secondly, of the guilty knowledge and conduct of the accessory. In the first place, it is an invariable rule, that the guilt of the principal must be averred upon the record. This may be done in different ways, according as the principal and accessory are indicted together, or as the accessory is separately indicted, after the convic-

(b) 2 Mod. Ca. 357.

(d) 3 Ins. 138. Hale, 218.

(c) R. v. Walker, Leach, Bracton, c. 13. s. 1 & 2. R. v.

tion of the principal. In the first case, the indictment first charges the principal with the commission of the felony, and then avers, that the said C. D. well knowing the said A. B. to have done and committed the said felony, in manner and form aforesaid, afterwards, to wit, on &c. at &c. did feloniously receive, comfort, harbour, and maintain the said A. B.; or, that he did such other act, in respect of the principal felon, as makes him an accessory. Where the accessory is indicted after the conviction of the principal, and in the same county, the indictment may either allege, that the principal committed the felony, and then charge the accessory, as in the former case, or may set out the record of the conviction of the principal, averring that he was in due form of law convicted of such felony, and then proceed to charge the accessory as in other cases(e); and the indictment need not allege that the principal has been attainted(f).

But where a person is indicted in one county, as accessory to a felony committed in another, it seems to be necessary to allege, positively, the commission of the felony in the second county: this was expressly holden(g) by the judges, who consulted upon the mode of proceeding against Lord Sanchar, as an accessory before the fact, and the reason which they gave, seems to be equally applicable to the case of an accessory after the fact(h).

In an indictment against one for a misdemeanor, in receiving stolen goods, it is unnecessary to allege the original felony with either time or place(i); nor is it necessary to state the name of the principal offender, for the great object of the statutes relating to this offence, was

(e) Fost. 365. 8 E.4. 3. Fitz. (g) Lord Sanchar's case, 4 Ind. 16. Keil. 194. R. v. Ber- Co.  
ridge, 3 P. Wms. 439. (h) See p. 130.  
(f) Ib. and Hyman's Case, (i) R. v. Scott, East. P. C.  
East. P. C. 781. 781.

to bring the receiver to justice in cases where the principal offender cannot easily be discovered (i).

A defendant may be indicted for receiving stolen property, if it remain the same in substance, though its name be changed; and, therefore, a principal may be indicted for the stealing of a live sheep, and the accessory with receiving twenty pounds of mutton (k).

In an indictment against a receiver as accessory, it must appear the value of the property stolen and received exceeded one shilling, for in petit larceny there are no accessories.

The property stated to have been received, should agree with that averred to be stolen; but, in *Morris's case* (l), where the indictment charged the principal with stealing two bank-notes, the property of S. S. and charged the accessory with receiving the said notes, the property and *chattels* of the said S. S. it was holden, that the word *chattels* might be rejected as surplusage.

Though, in general, the offence of high treason be of so heinous a nature, that all who participate in it are considered to be principals, yet it seems, that one who becomes a traitor, by receiving the principal traitor, is so far to be considered in the light of an accessory, that he cannot be convicted before the principal, and that he ought to be specially charged with the criminal reception of the principal traitor (m).

Mrs. Lisle was indicted for "entertaining and concealing John Hicks, a false traitor, knowing him to be such," and was convicted; but her attainder was afterwards reversed, by an act of parliament, which declared her pro-

(i) *R. v. Thomas*, East. P. C. 781.

(l) *Leach*, 525.

(m) *Fost.* 346.

(k) *R. v. Cowell and Green*, East. P. C. 781.

secution to have been irregular and illegal, since the said Hicks had not, at the time of the trial, been attainted or convicted of any such crime (n).

Where an homicide amounts to murder, because it is committed on the body of an officer in the execution of his duty, or of any private person specially protected by the law, it seems to be sufficient, in all cases, to charge the party with murder, in the common form, without any special averment as to the situation of the officer(o) killed; for the gist of the accusation is the killing with malice prepense, which constitutes the aggravation, and, as alleged in the indictment, is an inference arising upon evidence, from the circumstances of the case. But if the office be alleged, it is sufficient to aver, generally, that the person was a constable, without setting forth any circumstances relating to his appointment (p).

III. *From other circumstances.*

It has already been observed, that no indictment is sufficient which alleges an act or omission in itself innocent, unless it proceed to disclose circumstances which render such act or omission illegal. But it seems, that whether the offence be of common law or statutable origin, if a *prima facie illegality* be shewn, the indictment will be sufficient, for it is in general unnecessary to *negative any excuse* or justification, the affirmative of which would be an answer to the charge; such averments would be unnecessary, since the prosecutor would be under no obligation to prove them, and therefore the allegation and proof of such circumstances as would avail

(n) 4 St. Tr. 130.

(p) Gordon's case, Leach, 581.

(o) Mackally's case, 9 Co. R. v. Hollond, 5 T. R. 607.  
67. Cro. J. 280, Cro. Car. 183.  
372. 538. 3 Ins. 52. Hale, 45.

by way of justification, come most properly from the defendant (q).

In the case of the King v. Baxter (r), the defendant was indicted under the stat. 22 G. 2. c. 58. s. 1. which enacts, that the receiver of certain stolen goods may be indicted as for a misdemeanor, although the principal felon be not before convicted of the said felony, and whether he is amenable to justice or not. It was moved, in arrest of judgment, that the indictment was defective, inasmuch as it had not stated, negatively, that the person who had stolen the goods had not been convicted. But all the judges held that the averment was unnecessary, for that it would be stating a mere negative averment which the prosecutor would not be bound to prove; that the fact was matter of evidence to be proved by the defendant, which, when proved, would entitle him to an acquittal; that this opinion was warranted by the case of the King v. Pollard (s), which was an indictment on the stat. 5 Ann, c. 31. s. 5.; and the objection was, that the prosecutor had not averred that the principal could not be taken, but the averment was not necessary; and that the principle was to be found in still older authority, 1 Sid. 303. and 2 Haw. c. 25. s. 112, where it is stated, that if *there be any description in the negative, the affirmative of which would be a good excuse for the defendant, the proof of it lies on him, and need not be stated in the indictment.*

But the above rule, as cited from Hawkins, is too general, for it has been holden, by great authorities, that a negative description must be averred, where it is an es-

(q) R. v. Baxter, 5 T. R.  
84. R. v. Pollard, 2 Lord  
Ray. 1370. 2 Haw. c. 25. s.  
112. 1 Sid. 303.

(r) 5 T. R. 85.  
(s) Ld. Ray. 1370.

essential ingredient in the offence. According to Lord Hale, where an offence is made felony, or otherwise punishable by act of parliament, though the indictment must take in the circumstances which *in the body of the act* make up the offence, yet if by proviso in the same statute, or by any subsequent statute, some cases or circumstances are omitted out of the act, the indictment need not mention them, and qualify the offence so as to exempt it out of the proviso, but the party shall have the benefit of the proviso by pleading not guilty (*t*).

In Palmer's case, the prisoner was indicted under the st. 8 & 9 W. 3. c. 26. s. 6. which enacts, that "if any person or persons shall take, receive, pay, or put off, any counterfeit milled money, or any milled money whatsoever, unlawfully diminished and not cut in pieces, at and for a lower rate and value than the same by its denomination doth or shall import, or was coined or counterfeited for, they shall be guilty of felony." The indictment charged, that the prisoner had put off ten pieces of counterfeited milled money, made and counterfeited to the likeness and similitude of the current silver coin of the realm, called shillings, for 21 pieces of the current silver coin of the realm, called shillings, being a lower value than they by their denomination did import, &c. No count, in the indictment, stated that the counterfeit money, charged to have been put off, had *not been cut in pieces*, and the court was clearly of opinion that the indictment was bad, for the words *not cut in pieces*, are a material part of the description of the offence (*u*).

In Jones's case, an information was holden to be insufficient for not averring, that certain goods, imported from Holland, were *not of the growth of Holland* (*x*).

(*t*) 2 Hale, 170.

(*x*) Hardr. 217. Vin. Ab.

(*u*) Palmer's case, Leach, tit. Inf. 418.

120. coram Sir W. Blackstone.

In the case of the *King v. Bell* (y), which was an indictment under the stat. 8 & 9 W. 3. c. 26. for having a coining press in possession, every thing which shewed that the defendant had no authority was negatively set out, and Lord Mansfield (z) held that this was necessary, and a point settled by all the authorities. And Mr. Justice Denison observed, "there is a known distinction between exceptions in a statute, by way of proviso, which need not be set forth, and *those in the purview of the act*; and the case of *R. v. Bell* is very strong to this point, upon an indictment for having coining instruments in his custody.

It had been holden indeed (a), by all the judges, soon after the passing of the stat. 8 & 9 W. 3. c. 26. that the indictment ought to negative all the exceptions contained in the enacting clause, since the want of the authority mentioned in the exceptions, is part of the description of the offence. The same point was decided in the early part of the last century, in the case of a prisoner who had been convicted before Mr. J. Turton, at York (b).

And in the case of *R. v. Jarvis* (c), Lord Mansfield observed, "it is a known distinction, that what comes by way of proviso in a statute, must be insisted on by way of defence by the party accused; but, where exceptions are in the enacting part of the law, it must in the indictment charge that the defendant is not within any of them."

In the case of convictions, it has long been fully (d)

(y) *Foster*, 430.

(d) *R. v. Ford*, Str. 555.

(z) *Burr*. 148.

*R. v. Bryan*, Str. 1101. Doug.

(a) *East. P. C.* 167. *Cro.* 331. *Sander's case*, 1 *Saund.* 262. *R. v. Tucker*, *Ld. Ray.*

(b) *East. P. C.* 167.

1386. *R. v. Little*, *Burr.* 613.

(c) *Fost.* 430. 1 *East. R.*

644. *Burr.* 148.

settled, that the information must negative the exceptions contained in the purview of the statute upon which the conviction is founded (*d*). In the case of the Queen v. Matthews (*e*) indeed, it was holden, that in a conviction under the stat. 4 & 6 Ann. c. 14. it was sufficient to allege, generally, that the defendant, *not being qualified according to law*, &c.; but, in the subsequent cases of R. v. Hill (*f*), R. v. Pickles (*g*), and R. v. Jarvis (*h*), it was holden, that the several qualifications in a conviction, under the statute of Ann, ought to be expressly negatived. In a penal action indeed, upon the same statute, it has been holden to be sufficient, to negative the qualifications generally; yet Mr. J. Foster, in the case of the King v. Jarvis, intimated his opinion that this was not sufficient (*i*). These, indeed, were cases of summary conviction, before justices of the peace, but there does not appear to be any distinction, in principle, between informations before magistrates and convictions; for every thing essential to the true description of the offence, ought to be alleged in an indictment, and that which is not essential to such a description is unnecessary in a conviction; and the court, in the case of the King v. Jarvis, seem to have considered the same arguments as applicable to (*k*) indictments as well as convictions.

- (*d*) And even those contained in a clause, to which the enacting clause expressly refers. R. v. Pratten, 6 T. R. 559. 1 Str. 497. 1 East, 644.
- (*e*) 10 Mod. 27.
- (*f*) Ld. Ray. 1415.
- (*g*) Cited by Lord Mansfield, Burr. 148.
- (*h*) Burr. 148.
- (*i*) This has, however, been
- sanctioned by many precedents, under the stat. 5 Ann. c. 5. ; but, in general, in a declaration under a penal statute, it is necessary to negative the exceptions in the purview, 1 T. R. 444. 7 T. R. 27.
- (*k*) See also the opinions of Lawrence and Le Blanc, justices, in the case of R. v. Stone, 1 East, 644.



Hence it may be inferred, that the position cited from Hawkins is too general, and that it does not extend to exceptions contained either in the enacting clause, or in a clause to which it immediately refers; and it is to be remarked, that in Baxter's and Pollard's cases, there was no necessity to call in aid so general a rule, for there the offence consisted in receiving stolen goods, knowing them to have been stolen; and though the authority of the court to try the offenders depended upon the negative circumstance that the principal felons had not been convicted, the definition of the offence itself remained just as it was before, wholly clear from any negative description.

The instance cited by Serjeant Hawkins, in support of his very broad position, is the case of an indictment for not going to church, in which it is unnecessary to aver, that the party had no reasonable excuse, &c.; it is a full answer to this to observe, that the stat. 29 Eliz. c. 6. s. 5. has rendered such an allegation unnecessary, by prescribing a general form of indictment.

And from analogy to the decisions in cases of convictions, it seems to be necessary in an indictment, not only to negative the exceptions in the purview of the statute, but also those to which the enacting clause immediately refers (*k*); and that, if exceptions be negatived, where it is not necessary they may be rejected as surplusage (*l*).

(*k*) R. v. Pratten, 6 T. R. 559. indictments founded upon statutes, see tit. Indict. on Statute.

(*l*) R. v. Hall, 1 T. R. 322. for further observations upon

## CHAP. IX.

*Of averring the Defendant's Intention.*

TO render a party criminally responsible, a vicious will must concur with a wrongful act (*a*). But though it be universally true, that a man cannot become a criminal, unless his mind be in fault, it is not so general a rule, that the guilty intention must be averred upon the face of the indictment:

In cases of treason, the traitorous inclination and design is expressed by the word *proditorié*.

And in all cases of felony the act must be alleged to have been committed *felonice*, a word denoting the corrupt intention of the defendant to perpetrate the particular species of felony with which he is charged. But where a particular intention, either at common law, or by the enactment of a statute, is essential to the offence, that intention must be expressly and plainly averred. Thus, in an indictment for burglary it is necessary to aver, either that the defendant did break into the dwelling-house and steal certain property, or that he broke in with intent to commit a specific felony (*b*); and the technical averment that the act was committed *burglariter*, does not in the latter case supply the want of a direct allegation of the defendant's intention. And there seems in general to be a distinction between cases, where the attainment of a particular criminal object constitutes the

(*a*) Haw. c. 73. s. 1. 5 Co. 4 Bl. Comm. 125. R. v. Ld. 125. 5 Mod. 165. Salk. 418. Abingdon, 1 Esp. R. 228.

(*b*) 1 Hale, 561.

crime, and offences resting merely in tendency. For where the end is actually accomplished, it must naturally be presumed, that the defendant had that end in view; but where the injurious consequence does not follow, the question of intention is more ambiguous, and therefore ought to be precisely averred on the face of the indictment.

Thus, in all indictments for the publication of libels, it is necessary to aver, that the defendant published the illegal matter *maliciously*, or to describe his intention by some equivalent epithet (c).

Where the statute creating a particular offence, or inflicting a heavier punishment upon one already existing, makes use of particular epithets as descriptive of the offender's intention, it is in general necessary to adopt them in framing the indictment.

Therefore, an indictment for the clipping and washing of coin, which offence was made treason by stat. 5 & 18 Eliz. must express (d) that it was done *causâ lucri*.

So an indictment in a præmunire, for aiding one being a principal maintainer of the see of Rome, is bad, if it omit "to the intent to set forth the authority, &c." which are part of the qualification of the offence contained in the statute (e); and in general, wherever a particular intent is part of the statutable definition of the offence, it should be averred in the terms of the act.

Where a statute creating a felony or other offence, makes no mention of the intention accompanying the prohibited act, it does not seem necessary to make any averment respecting it in the indictment. Thus, in an indictment under the stat. 3 H. 7. c. 2. for the taking

(c) Sty. 392. Per Ray, (d) 2 Hale, 189.  
C. J. 1 Vin. Ab. 533. pl. 3. (e) Dy. 363. 347.

away, &c. of an heiress, &c. though it is usual to aver the taking to have been *ex intentione ad ipsam maritandam*, yet it has been holden to be unnecessary to make that averment, because the statute has no such words as *ex intentione*; but, according to Lord Hale, it is safest to use those words (*f*).

With the exception of one particular species of treason, a mere guilty intention cannot constitute an offence against the law; but when an act has been done (*g*), then the law judges not only of the act itself, but also of the intention with which it was done; and though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable (*h*). But it seems to be a general rule, that in all such cases, where the act becomes criminal and punishable on account of the intent with which it was committed, the particular intention must be averred.

Thus where several persons were indicted for carrying one infected with the small-pox from one parish to another, it was holden necessary to aver, that it was done with an *ill intent* (*i*). And in the case of the King v. Phillips (*k*), Lord Ellenborough, C. J. observed, "if any particular bad intention accompanying the act, be necessary to constitute it a crime, such intention should be laid in the indictment." In many cases the allegation of intent is merely formal, being no more than the result and inference which the law draws from the act itself, and which therefore requires no proof, but what the act itself sup-

(*f*) 1 Hale, 660.

(*g*) See Parker's case, Leach, 48. indicted for having counterfeited money in his possession with intent to utter it.

(*h*) R. v. Schofield, Cald.

897. R. v. Higgins, 2 East, 4.

Per Lawrence, J. R. v. Bryan, Str. 866. R. v. Jolliffe, 4 T. R. 285.

(*i*) Andr. 162.

(*k*) 6 East, 473.

plies: but where the act is indifferent in itself, the intention with which it was done then becomes material, and requires, as does any other substantive matter of fact, specific allegation and proof.

It is frequently advisable to state specially the intention with which a particular offence was committed, though the offence itself, which is the foundation of the prosecution, be entirely independent of the particular intention charged. Thus, in an indictment for an assault, it is usual, for the purpose of aggravating the punishment, to aver, that it was made with intent to commit murder or rape, according to the fact, in order to guide the court in their infliction of punishment.

The same burglarious entry may be laid, in several counts of the indictment, to have been made with different intents; as, with intent to steal the goods of J. D. in the first count, and with intent to murder him in the second; for the facts and evidence are the same (*l*).

*With what particularity.*

When an evil intent, coupled with a particular act, is criminal, it does not appear to be essential to state the particular way in which the act was intended to produce the mischief: thus, as has already been noticed, it is unnecessary, in an indictment for forgery, to shew the particular method by which the defendant intended to render his fraud profitable; but it is sufficient to allege, that he forged the note, &c. with intent to defraud a particular person. But, in such cases, the intent must be proved as laid (*m*), and a variance would be fatal; therefore, in case of burglary, if the entry be alleged to have been made with intent to commit a specific felony, the indictment

(*l*) R. v. Thompson, Norfolk, Summ. Ass. 1781. East, P.C. 515.

(*m*) R. v. Powell, Leach, 90.

will not be supported by evidence of an entry with intent to commit another kind of felony (*n*): so, if A. be indicted for a burglary, with intent to steal the goods of J. W. he cannot be convicted upon evidence that he intended to steal the goods of J. D. (*o*); for the averment is material, and cannot be rejected as surplusage. And though where the burglary includes a larciny, it is sufficient to lay it to have been done with intent to steal, &c. the converse of the proposition is not true; for a burglary laid with a larciny, will not be supported by proof of a burglary with intent (*p*) only, for these are different offences, and an acquittal of the latter cannot be pleaded in bar of an indictment for the former (*q*). If an act be charged to have been done with a felonious intent to commit a crime, and it appear upon the face of the indictment that the crime, though perpetrated, would not have amounted to a felony, the word felonious being repugnant to the legal import of the offence charged, may be rejected as surplusage (*r*).

(*n*) 1 Hale, 561.

(*o*) *R. v. Jenks*, East. P. C. 514. See the same case, Leach, 896. from which it appears, that the objection was taken at the trial, but overruled, and the prisoner was convicted.

(*p*) East. P. C. 514.

(*q*) *R. v. Vandercomb* and Abbott, Leach, 816.

(*r*) *R. v. Scofield*, East. P. C. 1029. Cald. 397. But

qu. whether the word can be rejected as surplusage where the defendant is charged with having feloniously committed an act which is not felony, and not merely, as in the above case, with having attempted (with a felonious intent) to do that which is not felony. See *R. v. Holmes*, Cro. Car. 376. Kel. 29. affir. 2 Hale, 172. neg.

## CHAP. X.

*Of the Description of Persons, Places, and Things connected with the Offence, with Names, Quantity, and Value.*

- I. *Certainty of Persons*, p. 170.
- II. *Of Places*, p. 176.
- III. *Of Things moveable*, p. 180.

ACCORDING to Lord Hale, there must be a certainty in every indictment touching the thing wherein or of which the offence is committed (a).

This certainty seems to consist in the special description of the persons, places, and things mentioned in the indictment, with their respective names, situation, extent, nature, quantity, number, value, and ownership.

Certainty in the names of persons and things, the situation of places, and the names and ownership of property, is in general substantial, and the allegations concerning them must be strictly proved. Magnitude, quantity, number, and value, are, in some instances, essential to the description of the offence, and should, it is said, be stated with certainty, to enable the court to judge of the heinousness of the offence, and to inflict a proportionate punishment; but it seldom happens that a variance from these allegations is material.

I. *Of the description of persons with certainty of names.*

In an indictment for murder, it is in general essential to state the name of the deceased, and inquests, for the want of this particularity, have frequently been holden to be defective (b).

(a) 2 Hale, 182.

(b) 2 Haw. c. 25. s. 71.

And though indictments have formerly been allowed, which charged the defendants with suffering divers bakers to bake, &c. against the assize, for distraining divers persons without cause, without specifying the manner of those so suffered to bake or distrained upon: yet, according to later authorities (c), such indictments are insufficient, for they do not enable the court to judge of the measure of punishment which the offence calls for, neither do they apprise the defendant of the facts relied upon, so that he may be prepared for his defence; and an acquittal upon so general a charge, would not enure to his defence upon a subsequent indictment founded upon the same circumstances. So, according to Staunford, the person murdered ought to be named, in order to enable the party charged to vouch for his acquittal (d).

So, in burglary, the dwelling-house must be laid to be the dwelling-house of the real occupier (e).

So in an indictment for stealing in a dwelling-house to the amount of 40s. (f) the name of the person in whose house the larceny was committed must be averred (g).

And the rule seems to be the same in indictments for arson (h).

And though the averment *burglariter domum cujusdam Ricardi fregit* (i) has been held sufficient, the authority of this case has been much doubted, and indeed with great reason, for the two cases cited in support of it are directly against it (k); and the third proves no more than that an indictment for stealing the goods *cujusdam ignoti* (l)

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| (c) Br. Ind. 21. 2 Roll. Ab. | (h) Leach, 270. Qu. et vid. |
| 80. 38 Ass. 11. 22.          | Leach, 261. 11 Co. 29. 6    |
| (d) Staun. 181. b. 2. e. 18. | Bac. Ab. 652.               |
| (e) Leach, 104. 272.         | (i) Moor, 466.              |
| (f) 12 Ann. c. 7.            | (k) 18 Ass. 15. F. Ind. 27. |
| (g) Leach, 270. 257.         | (l) 9 E. 4. 1.              |



is sufficient, which is no authority for the principal case, since there is a wide difference between an averment that the person is unknown, and an imperfect description of one who can be ascertained.

So, in general, the name of the owner of property stolen must be specified (*l*).

*Next, with what certainty the name should be stated.*

It has been holden, that an indictment for an assault upon *John*, parish priest of *D.* in the county of *C.* is sufficient, for it is such a description of the person that it can apply to one only (*m*).

Next the description by the name of baptism only, without any further description, is insufficient; for though in a note of a case in *Moor's Reports*, it is said to have been adjudged that an indictment against one *Cole*, *quod burglariter domum cujusdam Ricardi fregit*, was good without the surname, yet, as has already been observed, this case does not appear to have been warranted by the authorities cited in support of it.

But there is no necessity for any addition to the name of the person robbed or murdered, it is sufficient if the indictment be true, that is, that *J. S.* was robbed or murdered, though there be many of the same name (*n*).

It is usual to describe the person injured to be in the peace of God and of the king, but these words are not necessary (*o*).

The person may be described by the name by which he is usually known (*p*).

Any repugnancy or inconsistency in the description

(*l*) 1 Hale, 512. 2 Haw. c. 25. s. 71. Leach, 578. (o) 4 Co. 41. 2 Haw. c. 25. s. 73.  
 (m) 2 Haw. c. 25. s. 72. (p) Leach, 1006. 2 Haw. c. 25. s. 72.  
 (n) 2 Hale, 182.

of the person injured will vitiate the indictment, as where the defendant is charged with stealing the goods *prædicti* J. S. no such person having been previously mentioned (s). For though in civil actions the word *prædictus* has been rejected as surplusage (t), yet this is said to have been done by virtue of the statutes of jeofails, which, it is well known, do not extend to criminal cases.

And it may be laid down as an universal rule, that any variance from the name laid in the indictment will be fatal upon the trial.

The special exceptions to the rule, as already observed, rest upon necessity, and consist of cases where a particular description would be impracticable or highly inconvenient.

Thus it has been holden to be sufficient to aver, that the defendant murdered *quendam ignotum* (u), where a stranger, unknown to the country, is found slain; or where the dead body is so mutilated, that the remains cannot be sworn to be those of a person formerly known by name.

So it is said, that if a stranger, unknown to the country, be robbed, and will not come in to prosecute, or discover his name, an indictment against the offender for having robbed *quendam ignotum* (x) is good. So (y) an indictment may be maintained for assaulting *quendam ig-*

(s) 2 Haw. c. 25. s. 72.

(x) F. Ind. 12. 17. 2 Hale,

(t) 3 Lev. 436. Cro. Eliz. 181. Dyer, 99. Keil. 25. Plowden, 85. 129. Qu. and see tit. Amendment.

(y) So if a person steal the

(u) 1 E. 3. 20. 1 Ass. 7. F. goods of an abbey during a vacancy, he may be indicted for stealing *bona ecclesie*. 7 E. 4. 129. 9 H. 6. 45 b. Dyer, 99. 14. F. Ind. 15.

*notum* (a), or against a highwayman, or other person notoriously suspected, who has been apprehended with a number of valuables in his possession concerning which he can give no satisfactory account (b).

And in such case it has been laid down, that the defendant may be charged with stealing the property of persons unknown, or with stealing them generally (c). But the latter branch of this position seems very dubious; for the indictment in that case would neither allege whose the property was according to the general rule, nor account for the omission, by saying that the proprietors were unknown.

For it seems perfectly clear, that the omission of the name of the party murdered or robbed is warranted by necessity only; and that, whenever the name can be ascertained, it ought to be specified (d). Therefore, in an appeal of death, the name must always be alleged; for since such a proceeding must be instituted by the nearest relation, the name must of necessity be known (e). And it was anciently holden, that whenever one was indicted for the death of another, the inquest ought to tell his name (f),—a position certainly much too general for the purposes of justice, since it would ensure the escape of a murderer, whenever the name of the party could not be ascertained.

But, as already observed, it has long been perfectly settled, that an indictment for the murder or robbery of

(a) Plow. 85 b. Dyer, 99. (d) 2 Haw. c. 2. s. 71.  
285. 2 Hale, 181. Dyer, 285. Summ. 107.

(b) 2 Haw. c. 25. s. 71. (e) 2 Haw. c. 23. s. 78. Ib.

(c) 2 Haw. c. 25. s. 71. F. c. 25. s. 71.  
Ind. G. 26. S. P. C. 95. cont. (f) 1 E. 3. 20. 26. 1 Ass. 7.  
F. Ind. 27. Br. Ind. 20. 30 Fitz. Cor. 159. 182. B. Ind.  
Ass. 37. 10.

a person unknown is intrinsically sufficient, whether exception be taken by demurrer, or upon motion in arrest of judgment (*i*). And the same reason extends to the case of a receiver of stolen goods, who may be indicted without naming the principal offender (*k*).

The proper limitation to this class of exceptions must, therefore, be applied by the court in its discretion upon the trial; for if it then appear, that the name was in fact known to the jurors, it must also appear that the statement was not warranted by the exigency of the case, and the petit jury cannot consistently find the defendant guilty of robbing a person unknown, when it plainly appears that he was known (*l*).

And the opinion (*m*) of Serjt. Hawkins seems well warranted, that the want of such necessity (*n*) was probably the reason, why indictments, not shewing to whom the wrong was done, were disallowed in the old books.

It may be observed here, that a description of this kind does not deprive the defendant of his plea of *autrefois acquit* or *autrefois convict*; for if he be again indicted for the same supposed offence, he may plead his former acquittal, and aver the person to be the same (*o*).

And as the name of the principal individual, to whom the injury has been done, may in cases of necessity be

(*i*) Summ. 107. Dyer, 285. 99.

(*k*) Vide supra, R. v. Thomas, p. 158.

(*l*) See Sum. 95. Plow. 85. Keil. 25. 9 H. 6. 45. Dy. 99. Dalt. c. 131.

(*m*) 2 Haw. c. 25. s. 71. 30 Ass. 37. 18 Ass. 15. 2 Leon. 39.

(*n*) Note, *Ld. Dyer* held, that an indictment, *quod felonice cepit bona cujusdam ignoti*, was sufficient; because the goods may be carried into another county, and so not known who had the property. *Dyer*, 99.

(*o*) *Plowden*, 85 b. *Dyer*, 97. 285. 2 *Hale*, 181.

omitted, so, for the same reason, may the names of others, by means of whom the offence has been committed.

The defendant (p) was indicted for selling divers quantities of beer to divers faithful subjects, to the jurors unknown, in unlawful measures. Upon demurrer the defendant objected, that the indictment did not state to whom the beer was sold; but the court held, that the indictment was sufficient, for the informer might not know the name of the person to whom it was sold; and that it was an offence, let it be sold to whom it would (q).

In the case of the regicides it was holden, that the fact of beheading the king was well laid to have been done by some person unknown, with a vizard on his face (r).

In an indictment for harbouring thieves, it has been holden to be unnecessary to specify their names.

So an indictment stating, that the defendant, *cum viginti septem aliis* (t), engrossed, &c. has been holden to be sufficient.

II. *Next as to the description of the place, &c. connected with the offence.*

In indictments for burglary it must be averred, that the defendant broke and entered the *dwelling-house of another*; and it is not sufficient to charge him with breaking and entering the house simply (u).

The house must be laid to be the dwelling-house of

(p) *R. v. Gibbs*, Str. 497. same objection was taken, but the court does not appear to

(q) Note, judgment was given have decided upon it.

(r) *Kel. 10.*

(t) *Cro. Car. 380.*

(u) 1 Hale, 550.

(q) Note, judgment was given for the defendant on another exception. In *R. v. Roberts*, 4 Mod. 100. 3 Salk. 198. the

the real occupier (*y*), and a variance in evidence would be fatal (*z*). And the same rule applies to indictments for arson (*a*). And in an indictment for stealing in a dwelling-house to the amount of 40s. in order to oust the defendant of his clergy, the surname as well as the christian name of the person, in whose dwelling-house the offence was committed, should be averred (*b*). Also in an indictment under the stat. 3 W. & M. c. 9. for stealing property from lodgings, the name of the person, by whom the goods and lodgings were let, must be specified (*c*).

If several inhabit several rooms of a house, part of which house is also occupied by the owner, the house must be averred to be the dwelling-house of the owner, though the offence be committed in the several tenement of another occupier; but if the owner does not occupy any part, each separate tenement may be laid to be the dwelling-house of the tenant (*d*).

In an indictment for burglary, laid with an *intent to steal*, a variance in evidence from the ownership laid in the indictment, will be fatal.

Jenke was indicted for burglariously breaking and entering the dwelling-house of Joseph Davis, with intent to steal the goods of Joseph Wakelin. It clearly appeared, that Wakelin had been inserted in the indict-

(*y*) Leach, 104. 272. In 258. 11 Co. 29. R. v. Holmes, Cole's case, Moor, 466. the shop Cro. Car. 376.

was stated to be the shop of (b) Leach, 286. Thomson and Richard, without any surname; Macdamil's case, Leach, 379.

yet the indictment seems to (c) R. v. Pope, Leach, 377. have been deemed sufficient. 617.

Qu. et vide Leach, 286. (d) R. v. Rogers, Leach,

(z) R. v. White, Leach, 286. 104. 272. Carrol's case. Lee v. R. v. Woodward, ib. Gansel, Cowp. Rep. 2. East.

(a) R. v. Brome, Leach, P. C. 499.

261. R. v. Spalding, Leach,

ment, by mistake, instead of Davis; and the judges were of opinion, that this mistake was fatal as to the burglary; and that the prisoner was entitled to an acquittal, since the description of ownership was sensible and material, and could not be rejected as surplusage (*e*).

In Durore's case the defendant was indicted for maliciously shooting at H. Sandon, in the dwelling-house of James Brewer, &c. it appeared in evidence to be the house of John Brewer, &c.; and the court held the variance to be fatal, though the allegation might not have been necessary to the validity of the indictment (*f*).

But where a robbery laid to have been committed in the dwelling-house of A. is proved to have been committed in a dwelling-house, but no evidence is given of the proprietor's name, the defect is immaterial, since a robbery is ousted of clergy wherever it is committed (*g*).

In an indictment or presentment (*h*) for the non-repair of a highway, the *termini* of the highway need not be stated, for highways have no bounds.

(*e*) East. P. C. 514. Leach, in the dwelling-house of Joseph 896. S. C. but apparently mis- Johnstone; the house was reported. proved to belong to Johnstone,

(*f*) R. v. Durore, Leach, the husband of the prisoner, 390. tamen qu. and see the but his Christian name was not next note. proved to be *Joseph*. And in

(*g*) In Pye's case, Warwick, both of these cases the judges 1790, cor. Thompson, B. the held, that the prisoners had robbery was laid to have been been properly convicted.

(*h*) Latch, 183. Halsey's case, Pal. 389. 2 Roll. Rep. 412. 1 Str. 44. 10 Mod. 382. Andr. 145. R. v. Thompson, 10 W. 3. 1 Haw. c. 76. s. 86. alleged to have been committed

But it must appear, that the road lies within the parish or other division charged with the non-repair.

An indictment, charging that A. stopped a way at D. leading from D. to S. is bad, for *from D.* is exclusive of D. (*k*).

So the word *unto* is exclusive: in the *King v. Gamlingay* the indictment stated, that "there was and is a common and antient king's highway, leading *from* the parish of Hatley towards and *unto* the parish of Gamlingay; and that a part of the said highway, situate, lying, and being *in* the said parish of Gamlingay, containing in length, &c. was and yet is in great decay, &c."

After conviction a rule was obtained for arresting the judgment; and the court were of opinion, that the indictment was defective, for the defendants were only bound to repair that part of the road which lies within their own parish; but the road is described as leading from Hatley *unto* Gamlingay, which excludes Gamlingay, and therefore judgment was arrested (*l*).

So in the case of *Hammond v. Brewer* the question was, whether the stat. 26 G. 2. c. 54. for repairing the road *to* and *from* the town of Battel in Sussex, excluded or included the town of Battel; and it was holden, that both the words *to* and *from* were exclusive (*m*).

A conviction under the stat. 5 G. 3. c. 14. for fishing without the leave of the owner, alleged the offence to have been committed "in part of a certain stream which runneth between B. in the parish of A. in the county of W. and C. in the same county;" and it was quashed, because it did not shew that the intermediate course of the

(*k*) 2 Roll. Ab. 81.

(*l*) Leach, 596.

(*m*) 1 Burrow, 376. Leach,

597.



stream between the two *termini* was in the county of W. (*n*).

It has been holden necessary to state the extent of the evil complained of by a description of the length and breadth of the road out of repair (*o*).

But probably the omission of the quantity would not now be considered as a fatal objection; since the court does not now estimate the fine from the description of the length and breadth of the road, as stated in the indictment. And it has been holden, that an indictment; averring that a certain highway and bridge were in a ruinous condition, was good, though it did not state the extent of the nuisance.

It is sufficient to describe the road as a common king's highway generally, without stating whether it was a footway only, or a way for horses, carts, and carriages; for if it be a common highway, it is an highway for all these purposes (*p*).

III. *Next as to the description of moveables.*

It is not allowable to aver generally, that the defendant stole the goods and chattels of J. S. without specifying them (*q*).

And, according to Lord Hale, the same certainty is required in an indictment for goods as in trespass for goods, and rather more certainty; for what will be a defect of certainty in a count will be much more defective in an indictment; and the learned judge adds, therefore, for this matter vide title Count, *et breve per totum* (*r*).

(*n*) R. v. Edwards, 1 East. 2 Saund. 158. Trem. 201. 205.  
R. 278. Cro. Car. 266. 1 Salk. 359.

(*o*) 1 Haw. c. 26. s. 88. Cas. (*q*) 2 Haw. c. 25. s. 74.  
temp. Hard. 106. 316. 496.

(*p*) Cases temp. Hard. 315. (*r*) Hale, 183.

Chattels should, it appears, be described with certainty of their *nature, quantity or number, value, and ownership* (t).

In the description of the thing itself, certainty to a common intent, as it is technically called, is generally sufficient; which seems to mean such a certainty as will enable the jury to decide, whether the chattel proved to have been stolen, is the very same with that upon which the indictment is founded; and shew judicially to the court, that it could have been the subject matter of the offence charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment relating to the same chattel.

Where the subject matter is defined by a statute, the descriptive words contained in the act should be also used in the indictment. Where the act uses several descriptive terms, one of which being general included the more specific term, an indictment would be bad, which used the more general instead of the more special description.

Thus, it was holden, that an indictment under the stat. 14 G. 2. c. 6. and 15 G. 2. c. 34. for stealing a *cow*, was not supported by proof that the defendant stole a *heifer*; the judges being of opinion, that as the statutes, upon which the indictment was founded, mentioned both *heifer* and *cow*, in describing the several animals they were intended to protect, the one must have been used in contradistinction to the other, and therefore that the evidence did not support the indictment (u).

A certain dog, *called* a greyhound, has, it is said, been deemed to be a sufficient description of a greyhound (x).

(t) *R. v. Burnaby, Ld.* (u) *Cooke's case, Leach, 123.*  
*Ray. 900. Playter's case, 5* (x) *Under the stat. 5 Ann.*  
*Co. 34. R. v. Catherall, Str. c. 14. Boscawen on Convic-*  
*900. tions, p. 97.*

In an indictment (y) for stealing an animal, generally considered by the law to be *feræ naturæ*, it must be averred, either that it was dead or reclaimed at the time of the felony; and therefore an indictment for stealing a *pheasant* of the goods and chattels of H. S. was holden to be insufficient, for without an averment to the contrary, it must be presumed to be in its original state.

In an indictment under the stat. 22 & 23 C. 2. c. 25. against stealing fish out of ponds, &c. the fish may be alleged to be the *prosecutor's* property, though the allegation is not necessary (z); neither is this necessary under the stat. 5 G. 3. c. 14. (a). But unless the fish be taken from a trunk or stew, or other situation in which they are kept deprived of their natural liberty, it would be improper to describe them to be of the *goods and chattels* of the prosecutor; but if they be stolen from a trunk net, stew (b), or close pond (c), they are the subject matter of larciny, and may be described to be of the goods and chattels of the owner. But the indictment should describe what kind of pond it was, in order to shew that the taking amounted to felony.

By the stat. 2 G. 2. c. 25. (d) "if any person shall steal or take by robbery any Exchequer orders or tallies, or other orders, entitling any other person or persons to any annuity or share in any parliamentary fund, or any Exchequer bills, Bank notes (e), South Sea bonds, East India

(y) Staunf. 25 b. 3 Ins. 109, (c) Lamb. 274. Staun. 25. 110. Rough's case, East. P. 3 Ins. 109. 1 Haw. c. 33. s. 39. C. 607. (d) Made perpetual by 9

(z) R. v. Steer and others, G. 2. c. 18. 3 Salk. 189, 6 Mod. 183. (e) Though the word is in

(a) R. v. Hunsdon, East. the plural, the statute extends to the stealing of a single bank

P. C. 611. note. Hassel's case, Leach, 1. (b) R. v. Steer, 3 Salk. 189. 6 Mod. 183.

bonds, dividend warrants of the Bank, South Sea company, East India company, or any other company, society, or corporation, bills of exchange, navy bills, or debentures, goldsmiths' notes for the payment of money, or other bonds or warrants, bills or promissory notes for the payment of any money, being the property of any other person or persons, or of any corporation, notwithstanding any of the said particulars are termed in law a chose in action, shall be deemed guilty of felony, of the same nature and in the same degree, and with or without the benefit of clergy, in the same manner as it would have been if the offender had stolen or taken, by robbery, any other goods of like value, with the money due on such orders, tallies, bills, bonds, warrants, debentures, or notes, or secured thereby and remaining unsatisfied; and such offender shall suffer such punishment as he or she should or might have done, if he or she had stolen other goods of the like value with the monies due on such orders, &c. respectively, or secured thereby and remaining unsatisfied."

In an indictment under this act, the instrument stolen, &c. must be expressly averred to be a *bank note* or a *bill of exchange*, or some other of the securities specified; and, therefore, it is insufficient to charge the defendant with stealing a certain note *commonly called a bank note*, for none such is described in the act (f). And in the case of a *bank note*, it is sufficient to describe it generally as a bank note of the governor and company of the bank of England for the payment of one pound, the property of the prosecutor, the said sum of one pound thereby secured then being due and unsatisfied.

And notes, bills, &c. within the act, should be laid to

(f) Craven's case, Lanc. Summer Ass. 1801. coram I.d. Alvanley, East. P. C. 601.

be the property of A. B. and ought not to be described as *chattels*; but in the case of *Sadi v. Morris* (g), where they were laid to be the *property and chattels* of J. S. the word *chattels* was rejected as surplusage.

*Of the description of quantity, number, and value.*

It is in general necessary to ascertain the *quantity* by an averment of magnitude, weight, or number.

In the case of the *King v. Gibbs* (h), where the indictment charged the defendant with having sold divers quantities of beer in unlawful measures, it was objected, that the court could not, on account of the generality of the charge, form a judgment in what degree to punish the offender; and the court held, that for this fault the indictment must be quashed (i).

An information (k) charged Martin Van Henbeck with selling to such a one so many pipes of wine, not containing, as they ought to have done, 126 gallons each, and alleged, that though they were so defective, the defendant had not defalked the price *according to the want of measure*, whereby he had forfeited (l) to the queen the value of the wine so defective; and judgment was given for the defendant, because it was not shewed in how many vessels there was a deficiency.

So it is insufficient to charge the defendant with selling loaves short of weight, without shewing how much they wanted in weight (m).

So indictments have been holden to be insufficient, which charged the defendant with stealing *magnam*

(g) East. P. C. 601.

(k) 2 Leon. 38.

(h) Str. 497.

(l) Under the stat. 18 H. 6.

(i) See also 2 Roll. Ab. 81. c. 17.

pl. 14, 15, 16, 17. 8 Mod. 58.

(m) Salk. 687.

Andr. 75. Str. 900. Playter's case, 5 Co. 54.

*quantitatem straminis, and diversos cumulos tritici,—duas centenarius casei,* without adding any substantive to *centenas*, in order to ascertain the weight (o).

So the number of the several individual things stolen must be expressed, for though the court, in the case of the King v. Wetwang, refused to quash an indictment which charged the defendant generally with stealing *quosdam pisces* (p), yet this was by the opinion of two judges only, and against that of Mr. J. Twisden; and it was not directly adjudged by the two, that the indictment was good, but merely that the defendant ought to plead to it (q). On the contrary, an indictment was holden to be bad, which averred, that the defendant, feloniously took *twenty ewes and lambs*, because it did not appear how many of the one, and how many of the other he took, though it was said that *twenty sheep* alone would have been sufficient (r).

So an indictment for erecting several cottages, *contra formam statuti*, without shewing how many, was holden to be bad for uncertainty (s).

So was an indictment charging that the defendant, "*felonice furatus est oves et columbas*," without expressing the number (t). But, in an indictment for counterfeiting the king's coin, it is necessary to specify the kind of coin, though not the number (u).

So an indictment is insufficient charging the defendant with having engrossed a great quantity of fish, geese, ducks, &c. (x).

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|------------------------------|---------------------------------|
| (o) Cro. Eliz. 754. 2 Haw.   | (t) 2 Hale, 182.                |
| c. 25. s. 74.                | (u) Long's case, 2 Hale, 187.   |
| (p) 2 Keb. 178. 1 Lev. 203.  | (x) R. v. Gilbert, 1 East,      |
| Andr. 162.                   | 582. 1 Str. 497. 2 Haw. c. 25.  |
| (q) See 2 Haw. c. 25. s. 74. | s. 74. 1 Sid. 317. cont. 6 Mod. |
| (r) 2 Hale, 183.             | 42.                             |
| (s) 2 Roll. Ab. 85.          |                                 |

*Next as to sums and value.*

It is a general rule, that if theft be alleged of any thing, the indictment must set down the value, that it may appear whether the offence is grand or petit larciny (z).

It is sufficient to allege the subject matter to be of such a value, or of such a price. By some of the earlier writers (a) on criminal law, it has been holden to be proper to show the worth of all living things, and of such dead things as are sold by weight and measure, by averring, that they were of such a *price*, and the worth of other dead things by expressing their *value* (b), yet this distinction does not seem to be warranted (c), and, according to Lord Hale, this is but clerkship, and they may be used indifferently (d).

In grand larciny it is essential that the value of the chattels stolen should exceed one shilling, and it must therefore appear to be of greater value (e). And as it is essential to every species of larciny, that the property be of some value (f), it seems equally necessary that the value should appear to the court upon record.

It is questioned by Serjeant Hawkins (g), whether the value of the goods be essential to an indictment for trespass or any other crime where the value is immaterial to the nature of the offence, since in many ancient writs of trespass the value of the goods is not expressed;

(z) Lamb, 497. 2 Hale, 183.

(e) 2 Hale, 183.

(a) Lamb, b. 4. c. 5. f. 497.  
2 Hale, 187.

(f) See Mrs. Phipoe's case,  
Leach, 774. and Com. Dig.

(b) Lamb, b. 4. c. 5. f. 497.

Ind. G. 2.

(c) 2 Haw. c. 25. s. 75.

(g) 2 Haw. c. 25. s. 75.

(d) 2 Hale, 183. Cro. Jac.  
130.

See Dalton, c. 181. Lamb, b.  
4. c. 5. f. 496, 7. 2 Hale, 183.

there seems, however, to be this material distinction between writs in civil proceedings and indictments :—in the former case, the damages are to be assessed by a jury; and, therefore, it is not so requisite to set out the precise value upon the face of the record; but in criminal cases, the punishment is frequently inflicted at the discretion of the court, which ought therefore to be judicially informed of the circumstances and magnitude of the offence.

Where money, which is the current coin of the realm, has been stolen, it seems to be sufficient to allege the stealing of so many guineas or shillings of the current coin of the realm, in monies numbered, without averring their value (*h*); for to allege that 40 shillings of the current coin of the realm were of the value of 40 shillings, would be superfluous, and to aver them to be of a greater or lesser value would be repugnant. Where several articles of property are alleged to have been stolen, the value of each should be alleged, and it is not sufficient to allege the aggregate value of the whole (*i*).

In general, if the property be correctly described in species, a variance from that description upon the trial, as to weight, magnitude, number, or value, will be immaterial, unless the variance either affect the nature of the crime as well as the degree of the offence, or the magnitude of the penalty. And there is a distinction between cases where to constitute the offence the *value must be of a certain amount*, but where the excess beyond that amount is immaterial, and those where the offence, or its defined measure of punishment, depends upon the

(*h*) 1 Hale, 534.

would not be aided by verdict,

(*i*) 2 Hale, 183, and according to Lord Hale, such a fault



*quantity of that excess*; for in the first class, if that amount be proved, which is sufficient to constitute the offence charged, a variance from the amount averred is immaterial, but in the second the amount or quantity must be proved precisely as it is laid, and any variance will be fatal.

Thus, in an indictment for a highway robbery, a variance from the value laid is *wholly* immaterial, for there the value of the property affects neither the nature of the offence nor the measure of punishment.

In an indictment, under the stat. 12 Ann, for stealing in a dwelling-house to the amount of 40s. the property must be proved to be of the value of 40s. but the *excess* is immaterial (a).

So under an indictment framed upon the statute 17 G. 3. c. 26. s. 7. for taking more than 10s. in the hundred pounds for brokerage, it is necessary to prove that the defendant took more than 10s. in the hundred pounds, for in that the offence consists, but the *quantum of the excess* is immaterial, and need not be proved as laid in the indictment (b).

But in the case of usury, where the judgment *depends upon the quantum taken*, the usurious contract must be averred according to the fact; and a variance from it, in evidence, would be fatal, because the penalty is apportioned to the value (c).

#### *Ownership.*

The name of the owner cannot be dispensed with except in particular instances, which are exceptions from the necessity of the case.

(a) R. v. Gilham, 6 T. R. 149. and R. v. Baynes, 1d. 265. Ray. 1265.

(b) So in the case of extortion, R. v. Burdett, 1 Ld. Ray. 265. (c) R. v. Gilham, 6 T. R.

The indictment must either state the name of the owner of the goods, or account for the omission, by averring that the proprietor was unknown. And, therefore, an indictment charging that the defendant found a dead man, and feloniously stole two coats, without adding the property of some person unknown, is bad (*d*).

If the defendant steal a winding sheet or coffin from the grave, it should be described to be the property of the executors, administrators, or ordinary, as the case may be (*e*).

And since an executor is entitled to possession before he has proved the will, he may prosecute before probate (*f*).

And it is unnecessary to allege a special title, either in the executor or in ordinary, in case of an intestate, because their titles are founded upon possession.

But if the personal representatives cannot be well ascertained, the coffin, &c. may be described as the property of some person unknown (*g*).

If one steal the goods of a church during a vacancy, he may be indicted for stealing *bona ecclesiæ* (*h*). But this seems to be justified by necessity only (*i*).

If the goods of a parish be stolen, they ought to be described as the goods of the parishioners of S. being in the custody of the churchwardens, and ought not to be described as *bona ecclesiæ* generally (*k*).

In an indictment for stealing lead affixed to a church, the property ought not to be laid either in the church-

(*d*) 2 Hale, 181.

(*h*) 7 E. 4. 14. F. Ind. 15.

(*e*) 2 Hale, 181. 12 Co. 112. S. P. C. 95.

Haines's case.

(*i*) 2 Haw. c. 25. s. 71.

(*f*) Hale, 514.

(*k*) 2 Hale, 181. Cro. Eliz.

(*g*) East. P. C. 653.

145. 179.

wardens or in the parishioners (*m*); but in the case of the King v. Hickman and Dyer (*n*), it was holden, that the property in such case might be laid to be the vicar's. But Buller J. was of opinion, that it was absurd, in such case, to lay the property in any one, property in this respect being applicable to things personal only, and that it should only be charged to be lead affixed to the church, or to the house belonging to such a person (*o*).

If the goods of a chapel be stolen, they must be described as *bona et catalla capellæ in custodia præpositorum*, or if it be done in vacation, *bona et catalla capellæ tempore vacationis* (*p*).

And it is sufficient, in general, if the goods be laid to be the property of one who has but a special property in them, as if A. deliver goods to B. a common carrier, to carry for him, and B. is robbed, the indictment may allege them to be the goods of A. or the goods of B. at election, for B. has a special property in them because he is chargeable for them to A. (*q*).

So goods stolen from a stage coach may be described to be the property (*r*) of the coachman; those stolen from an inn, the property of the landlord(*s*); those stolen from a bailee as the property of that bailee (*t*), and it is not even necessary that the bailee should be responsible to the principal owner for the loss of the goods; for it has been holden, that cattle may be laid to be the property of the agister, on account of his possession, though he is

(*m*) R. v. Parker and Easy,  
East. P. C. 592.

(*n*) R. v. Hickman and  
Dyer, 1 Leach, 358. East. P.  
C. 593.

(*o*) Ib.

(*p*) 2 Hale, 181.

(*q*) 1 Hale, 513.

(*r*) R. v. Deakin and  
Smith, coram Grose, Ap.  
1800. East. P. C. 653. Tay-  
lor's case, Leach, 395.

(*s*) Summ. 67. East. P. C.  
653. Moor, 543.

(*t*) Pacher's case, East. P.  
C. 653.

not answerable to the owner for the loss (*r*). So where a master feloniously steals his own property from his servant, in order to charge the hundred, the goods may be described as the servant's (*s*). Though where property is taken from a servant in the presence of the master, the robbery may be alleged to have been committed upon the person of the master.

Where property belongs to trustees who are appointed by act of parliament, but *not incorporated*, their private names must be specified (*t*), and their description in the statute should be subjoined, to shew the capacity in which they were authorised by the legislature to act (*u*); but a *corporation* must prosecute in their corporate name, and it is not sufficient, after the enumeration of their natural names, to add they the said, &c. then being such a corporation (*x*); though it would be otherwise if the property vested in particular persons by their private names, for, by giving a corporate name, their natural and individual capacity becomes extinct (*y*).

If B. steal the goods of A. and C. steal the same from B—C. may be indicted for stealing the goods of A. for the property remains unaltered.

If a feme sole be robbed, and marry before an indictment be found, the ownership should be described by her maiden name.

The cloathes of a child, it is said, may either be alleged to belong to the child or to the father, but the latter seems the more correct (*a*).

(*r*) *Woodward's case*, East.  
P. C. 653. Moor, 543.

(*s*) 1 Hale, 513.

(*t*) 1 Haw. c. 34, 35.

(*u*) Leach, 578, R. v. Sher-  
rington and Bulkeley.

(*x*) R. v. Patrick and Pep-  
per, Leach, 287.

(*y*) R. v. Patrick and Pep-  
per, Leach, 578.

(*a*) 12 Rep. 113, 1 Sid.  
129. East, P. C. 654.

A. and B. his son, being farmers, jointly purchased a stock of sheep; B. died, leaving children, A. continued to manage the farm,—the stock was stolen, and in the indictment was laid to be the property of *A. and his grand-children*; A. swore that he considered himself as agent for the grand-children in respect of one moiety. The judges held, that though in such case there was no *jus accrescendi*, yet, that since A. swore that he held one moiety for the grand-children, no person could controvert it, and he might make distribution amongst them; and some of the judges held, that the property might have been laid in the grand-father alone, as agent to the grand-children (*a*).

It is provided by the stat. 26 G. 2. c. 19. that a person stealing part of a wreck, may be indicted and convicted though the owner cannot be ascertained. It seems, however, upon the authority of the above cases, that an indictment at common law, stating such goods to be the property of some person, to the jurors, unknown, would have been sufficient.

It is sufficient to state the owner by the reputed name, though it be not the real name.

Thus, where the indictment charged the prisoner with having stolen the property of Victory Baroness Turkeim, the prosecutrix stated that her name was *Selina Victoire*, that Baroness Turkeim was her real title, and that she was generally known by the appellation of

(*a*) John Scott's case, common Chamber, Northd. ass. who had the legal custody of the whole flock; though, in point of law, the property in whether it would not have been one undivided moiety had vested more correct to have laid the property in the grand-father, in the son's representative.

Baroness Turkeim, and the judges held the indictment to be sufficient (b).

In Mary Graham's case (c), the property was alleged to be of the goods and chattels of James Hamilton, esq. commonly called Earl of Clanbrassil, in the kingdom of Ireland. The owner was the Earl of Clanbrassil; and the judges were of opinion, that the description was sufficient, since the dignitaries of other nations are in England merely *esquires*, and that the words commonly called, &c. might be rejected as surplusage; but that the more correct description would have been James Hamilton, esq. Earl of Clanbrassil, in the kingdom of Ireland.

It is usual to aver the property to be of *the goods and chattels* of a particular person; and in Long's case (d), the indictment alleging that the defendant *felonice cepit quandam peciam panni cujusdam J. S.* was quashed, for not saying *de bonis et catallis cujusdam J. S.*

A nice distinction is made by the earlier writers, as to the allegation of property, between things animate and inanimate; an animated being, they say, ought to be described, as the ox, sheep, or horse of the person injured, simply; but the words *bona et catalla* ought to be used where the thing taken is inanimate (e). A distinction of this kind is truly what Lord Hale calls "*but clerkship.*"

There are several precedents (g) which allege a living animal to be *de bonis et catallis J. S.*; and in Rastal's entries there is an appeal of sheep stealing, which lays the property in the same way (h).

(b) Sull's case, Leach, 1005.

(c) Lamb. b. 4. c. 5. .496.

(c) Leach, 619.

Dalt. c. 131.

(d) Cro. Eliz. 490.

(g) Cromp. 247, 248.

(h) Rast, Ent. 55.

In general, an inaccuracy, or repugnancy in the allegation, or variance in the proof of ownership, will vitiate the indictment: thus, as before observed, if it be alleged that the defendant stole the goods *prædicti* J. S. no such person having been previously named, the indictment will be vicious (*i*). So if a burglary be laid with intent to steal the goods of *J. Wakelin*, the indictment will not be supported by proof of a burglary, &c. with intent to steal the goods of *J. Davis* (*k*).

If the person, alleged to be the owner, be a feme covert, or appear to have no interest in the possession of the goods, the defendant will be acquitted (*l*); but he may be presently indicted *de novo*, for stealing the goods of the husband or other owner (*m*).

And, with respect to ownership, it may be observed generally, that the name of the owner of the property, in relation to which the offence is committed, should be truly stated. Thus, in an indictment for cutting trees, &c. under the stat. 6 G. 3. c. 36. it is necessary to specify the owner's name (*n*). And, as has already been seen, the same particularity is necessary in indictments for burglary, stealing in a dwelling-house, arson, and in all larcinies.

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|--|---|
| (i) 2 Haw. c. 25. s. 92. tam. qu.                          | (l) 1 Hale, 513.                          |
| (k) Jenks's case, East. P. C. 514. Leach, 896. See p. 177. | (m) R. v. Emes, 1 Hale, 513.              |
|  | (n) R. v. Patrick and Pepper, Leach, 287. |

## CHAP. XI.

*Conclusion of the Indictment.*

**AFTER** describing the substance of the offence, it is necessary in cases of homicide, and usual in those of perjury, for the jurors to draw the legal conclusion from the premises, and to aver it formally upon the indictment. In case of murder, the conclusion is generally drawn in these words, "and so the jurors aforesaid, upon their oaths aforesaid, do say, that the said A. B. him, the said C. D. in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder," &c. In many of the older precedents it is specially alleged, that the defendant murdered the deceased, at a specified time and place; but the general form is sufficient, and is preferable, for if the day or place were to be mistaken, it seems the defect would be fatal; as, if the stroke be laid at A. and the death at B. and the indictment allege the murder to have been committed at A. (a).

When the indictment is founded upon some act or omission, which is punishable as a nuisance to the public in general, it is usually averred to have been done or omitted, *ad commune nocumentum* of the king's subjects; but these words are not essential, for they neither describe the crime itself, nor the facts which constitute it; and if the facts charged, must, from their very nature, have been a nuisance to society, it is unnecessary to aver that which the court cannot but infer.

And therefore, though indictments against common

(a) Heydon's case, 4 Co. 44.



scolds, and common barretors, usually conclude *ad commune nocumentum*, the conclusion has been deemed unnecessary (a).

At common law, the indictment in general concludes with the words, "*against the peace* of our said lord the king, his crown, and dignity." And, wherever the offence includes a breach of the peace, the indictment should conclude, *contra pacem*, for the necessity of these words is not taken away by the stat. 37 H. 8. c. 8.(b); but, where the offence consists in a bare omission, as the not performing the order of a justice of the peace (c), or rests in tendency, or partakes of the nature of a civil proceeding, as in case of an information for an intrusion, the averment appears to be unnecessary (d). But if these words be alleged in an indictment for a bare non-feasance, they may be rejected as surplusage (e).

According to Lord Hale, "every offence against a statute, should be laid *contra pacem*," (f) and though there are precedents without this conclusion, they do not appear to be warranted by any resolution (g), except where the offence consists in a bare non-performance (h).

Where the averment is necessary, it must be alleged to have been committed, "*contra pacem domini regis*," and *contra pacem* alone is insufficient (i).

*In different reigns.*

The offence is *confined wholly* to a preceding reign, or having been committed in a *preceding reign is continued*

(a) 2 Haw. c. 25. s. 59. But see Str. 1246. contra.

(b) 2 Hale, 188.

(c) Vent. 108. 111.

(d) 2 Haw. c. 25. s. 92. Rast. 409. 1 Keb. 360. 364 to 372.

390. Rast. 412. Salk. 380.

(e) Salk. 380.

(f) 2 Hale, 188.

(g) 2 Haw. c. 25. s. 92.

(h) 1 Vent. 108. 111.

(i) 2 Hale, 188.

into the present, or having been *begun* in a preceding reign, is *consummated* in the present, or is *confined wholly to the present*.

Where the offence is confined *wholly to a preceding reign*, it must be laid against the peace of the late king (*i*), but if it conclude also against the peace of the present king, the latter branch of the conclusion may be rejected as surplusage (*k*).

If a man be indicted for erecting a weir in one reign, and *continuing* it in a second, and conclude that it was erected and continued against the peace of the *then* king, without adding against the peace of the *late* king, it will be defective, for the gist of the indictment is the *erecting*, which wrong was done in the reign of the former king (*l*), and the offence should be laid against the peace of both.

But, thirdly, if in that case the erection had been made mere inducement, and the *continuance* of the nuisance had formed the gist of the indictment, the conclusion, *contra pacem regis nunc* would have been good (*m*).

If an indictment be found against a man for an offence, laid *contra pacem domini regis nunc*, he may be arraigned upon that indictment after the demise of the king; for the indictment is not discontinued by the demise of the king, though in some instances process is (*n*).

With respect to the averment, that the offence was committed *in contemptum regis*, the only authority for it appears to be a solitary dictum in the year book, 4 H. 6. pl. 7. which seems to admit that the averment is necessary in an indictment on a statute.

(i) 3 Burr. 1901.

(m) *Ib.*

(k) Cro. J. 377. 2 Hale, 189.

(n) 7 Co. Rep. 30, 31. 2

(l) Sir J. Winter's case, Hale, 189. Vin. Ab. tit. Ind. Yel. 66. 2 Hale, 189.

H. 10. pl. 5. Dalt. c. 184.

The averment *contra coronam et dignitatem* is used in many precedents (o), but there does not appear to be any decision in which they have been deemed essential to an indictment, and in Holbrook's case it was adjudged that an indictment for a riot was good without them (p).

Though every count of an indictment professes to contain a description of a distinct offence, and therefore it is proper to add to each a separate conclusion, yet since, in many precedents, each of which comprises a number of offences, there is no more than a general conclusion, such a conclusion appears to be sufficient (q).

In a conviction for deer-stealing, several offences were laid to have been committed on different days, and it was holden, that the general averment *illicite occidit* applied to all.

(o) Most of the precedents of indictments in Coke's Ent. and Tremaine's Ent. conclude so.

(p) 2 Roll. Ab. 82. 2 Hale, 188.

(q) R. v. Speed, Ld. Ray. 583. and see R. v. Broughton, Trem. 111.

## CHAP. XII.

*Indictments founded upon Statutes.*

- I. *Recital of the Statute and Effect of a Variance,*  
p. 200.
- II. *Description of the Offence:—1st. in Reference to the*  
*Circumstances mentioned in the Purview, p. 206 ;*  
*and 2dly. in Reference to the Language of the Sta-*  
*tute, p. 211.*
- III. *Conclusion against the Form of the Statute, p. 215.*

IN describing the averments essential to indictments, according to the division which was proposed, no distinction has been made between those which are framed upon the common law definition of an offence, and those founded upon the purview of a prohibitory statute. Neither, with propriety, can any distinction be made as to the degree of particularity and precision essential to the description of the two classes of offences; for a statute, in general, merely defines the offence, without prescribing the technical language in which a charge of that offence is to be expressed on the face of the indictment; and in principle, the same degree of certainty is requisite in the description of both statutable and common law offences, for, though the definitions are of different origin, whatever particularity is useful and necessary in the one case, must be equally so in the other.

Many instances have already been cited which prove that a description, closely following the words of the statute,

is not in itself sufficiently minute and specific. As where the indictment is founded on the stat. 33 H. 8. against obtaining money by means of false tokens, or upon the stat. 30 G. 2. c. 24. against obtaining money or goods by false pretences.

In these and numerous other instances, it has been holden to be necessary to specify the false tokens, the false pretences, and other means by which the offence has been committed, upon the face of the record (*a*).

It may, therefore, be assumed that there is no difference between common law and statutable offences, as far as regards the general rules, according to which the expanded description of the offence should be expressed upon the record, except, indeed, in those instances (and the exception confirms the observation) where the legislature has peremptorily directed that some general form of words shall be used.

In convictions indeed, Lord Holt held it to be sufficient to pursue the words of the statutes on which they are founded (*b*); but the contrary has frequently been decided since (*c*).

But though the same general rules apply to the description of both statutable and common law offences, there are some observations and technical rules peculiar to the former which it will be proper to consider.

Where the statute *is of a public nature*, the court is bound (*d*) to take notice of it; and, therefore, such a sta-

(*a*) See chap. 7.

(*b*) *Ld. Ray.* 583.

(*c*) See *R. v. Pemberton*,  
*Burr.* 679. 1037. 2 *Haw. c.* 25.  
*s.* 111. *Mallinson's case*, 2  
*Burr.* 679 *Boscawen on Con-*

victions. *Chapman's case*, *ib.*  
42. 2 *East*, 340.

(*d*) *Dyer*, 155. 346. 5 *H.* 7.  
17. 6 *Mod.* 140. *Cro. Eliz.*  
187. 236.

tute ought never to be specially pleaded, since, by pleading it, the danger of a material and fatal variance (*d*) is incurred.

But a private statute, if indicted upon, must be pleaded, and a mis-recital, if shewn to the court in a proper manner, will be fatal (*f*) ; and, therefore, it becomes necessary to consider with what degree of accuracy it is necessary to set forth a *private statute*. This kind of certainty relates to the *time and place* of making the statute, its *title*, or to the *purview* of the statute on which the indictment is founded.

In the first place, it has been adjudged that the total omission of the day on which the parliament was holden, is no fault in the recital of a statute (*g*) ; and, therefore, it is better to omit the day, for the purpose of avoiding a mis-recital which would be fatal.

Thus, if a parliament was first holden on the 28th day of April, in the 32d year of Henry the eighth, and afterwards holden on the 12th day of April in the next year, and a statute, then made, be recited as made at a parliament holden on the 28th of April, in the 32d year, the variance would be fatal (*h*).

So if parliament be summoned for the 23d, and afterwards be prorogued to the 25th, it would be a mis-recital to describe it as of the 23d (*i*).

So, in some cases, an averment that a parliament was

(*d*) Bac. Ab. Ind. H. 2 (h) Plow. 79. 83, 84. Cro. Haw. c. 25. s. 100. Plow. 79. Car. 136. 232. 3 Keb. 468. 83, 84. Cro. Eliz. 236. 245. 2 Jones, 50. Hob. 310. Cro. 4 Co. 48. 1 Roll. 50. Cro. J. 139. Cro. Eliz. 245. 2 Buls. Car. 135. 2 Hale, 172. 1 53.

Jones, 194. (i) Bac. Ab. tit. Ind. H. 2.

(*f*) 4 Co. 3. Sid. 356. 2 Haw. c. 25. s. 104.

(*g*) 2 Haw. c. 25. s. 104.

Dy. 203.

holden in a year when it sat by prorogation, has been considered to be fatal (*k*).

But in other cases mistakes of the latter description have been holden to be cured by the constant course of precedents (*l*).

A repugnancy in setting forth the time when the parliament was holden, is fatal, as if a statute be recited as made on such a day, in the 1st and 2d years of the king (*m*).

And, lastly, a misdescription of the time when the statute began to operate, has often been holden fatal, as if the indictment should recite, that the statute commenced at the time of making, when in fact its operation was to commence upon a day certain, afterwards (*n*).

But by the stat. 33 G. 3. c. 13. it is enacted, that the day, month, and year of passing a statute, and of its receiving the royal assent, are to be indorsed upon it, and to be deemed the date of its commencement, unless the contrary be expressed.

It has been said that an indictment was, in one instance, discharged for not averring the county in which the parliament was holden, but no reason is given for the opinion; and as it is not essential to allege the time of holding the parliament (*o*), probably an omission of the place would not be deemed material.

But a mis-recital of the place will vitiate the indictment (*p*).

With respect to the *title* and *preamble* of an act,

(*k*) Cro. Jac. 111. 139. (*m*) 2 Haw. c. 25. s. 104.  
Lutw. 140. 4 Ins. 27. 1 Moore, 302.

Brown, 100. Yel. 127. Dyer, (*n*) 2 Haw. c. 25. s. 106.  
95. 171. Skinner, 110, 111. (*o*) 2 Haw. c. 25. s. 104.

(*l*) Yel. 127. 2 Keb. 34. Dyer, 203.  
Dyer, 171.

(*p*) Ib. Cro. Eliz. 853.

neither need be set forth, for neither of them is part of the law: the title is the mere name or description given by the makers, and the preamble is no part of the statute itself, though it generally contains the motives or inducements for enacting the statute (*o*).

But Lord Holt was of opinion, that if a party undertook to set out the title, he was bound by it; so that if he pleaded the statute in justification, and could not produce one so entitled, his plea failed; that as to the saying of Lord Hale (*p*), it was said hastily, if at all, and that, notwithstanding his veneration for him, he could not agree with him (*q*).

In Parker's case (*r*) it was holden, by three judges against the opinion of Hobart, that the substitution of the word *indicari* for *indictari*, in the recital of the preamble of the statute of hue and cry, in a writ grounded upon it, was fatal; but in an action on that statute, though the declaration, in reciting the preamble, substituted the words, "*burning of houses*," for the word "*arson*," the plaintiff had judgment (*s*).

*Next, as to the recital of the purview.*

It appears clear, that if any material part be omitted or mis-recited, the indictment will be bad, because it will judicially appear to the court that the foundation is vicious upon which the charge professes to be grounded (*t*).

(*o*) Holt. 662.

(*r*) Hutt. 26. 3 Keb. 648.

(*p*) Hard. 324. Holt, 662. 662.

(*q*) Salk. 609. 6 Mod. 62.

(*s*) See 3 Keb. 647. 661,

Hard. 324. Hutt. 56. Mills v. 662. 2 Jones, 51.

Wilkins, 6 Mod. 62. 3 Salk.

(*t*) 1 Ld. Ray. 382. Doug.

331. Holt, 662. Chance v. 97. 2 Mod. 99. Cro. Car. 522,

Adams, contra. Hil. 7. W. 3. 232. 2 Haw. c. 25. s. 101,

Roll. 868.



And, therefore, if *vi* (*t*) be substituted for *forti manu*, in an indictment prohibiting entries *forti manu*; *nuncia* for *mendacia* in an indictment under the statutes of scandalum magnatum (*u*), the indictment will be bad (*x*).

But if such a mistake be made in reciting a public statute, it seems the defect will not be fatal, unless the indictment conclude against the form of the *said* statute (*y*); for if it conclude against the form of the statute in such case made and provided, the mis-recital will be rejected as surplusage and the court will give judgment upon that statute which warrants it (*z*). But where the indictment is founded upon a private statute, such a defect will not be cured by a general conclusion.

It seems to be a general and established rule, that a variance which does not alter the sense of a material part of the statute, will not avoid the indictment. Thus, it has been holden that the *seq* of Rome for *see* of Rome, in the recital of an oath prescribed by a statute,—I do declare in conscience instead of I do declare in *my* conscience,—maliciously *and* contemptuously for maliciously *or* contemptuously, were not fatal variances (*a*).

So, under the stat. 12 R. 2. *de scandalis magnatum*, it has been holden, that the prohibitory words, “none shall devise, speak, or tell, any false news, lies, or other such false things,” &c. were material words, and that a variance

(*t*) Cro. Eliz. 93. 2 Buls. Doug. 94. Fost. 372. Str. 259. 214.

(*u*) 4 Co. 12, 13, Cro. Car. (*z*) 2 Haw. c. 25. s. 104. 135. 2 Haw. c. 25. s. 101. 2 Hale, 173.

(*x*) See also Cro. Eliz. 236. (*a*) Cro. Car. 135. 136. Cro. J. 362. Pal. 565. 1 Jon. 194. Bur-

(*y*) Boyce v. Whitaker, row, 999. 2 Haw. c. 25. s. 102.

in reciting the subsequent words, "whereof discord, or any slander might arise within the said realm, was not material (a).

In the older reporters, many cases are to be found, where trifling variations from the purview of the statute have been considered to be fatal.

Such as the substitution of *assism novæ disseisinæ* for *assisam novæ disseisinæ* (b).

Or (c), expelled *and* disseised for expelled *or* disseised, or *admitteret et forisfaceret* for *amitteret et forisface-*  
*ret*" (d).

Yet it seems questionable whether these would now be considered as authorities, since the courts have relaxed much in later times from the strictness which formerly prevailed (e).

And the rule now seems to be, that if the variance consist in the omission, introduction, or alteration of words, purely superfluous and unnecessary, it will not be material if the sense be complete independently of such variance (f), unless indeed the alteration render the whole repugnant to the intent of the statute, for there, it is said, the superfluous words cannot be rejected; as, where the words, whoever shall do the same shall incur the pain, &c. are thus recited, whoever shall do *the contrary* shall incur the pain, &c. (g).

II. Having thus considered how far it is necessary in an indictment upon a statute, to set forth the authority upon

(a) Cro. Car. 135. 136. Cro. Eliz. 96. 307. 3 Keb. Pal. 565. 1 Jon. 194. Bur- 662.

row, 999. 2 Haw. c. 25. s. (d) Cro. J. 133.

102. (e) 2 Haw. c. 25. s. 108.

(b) 2 Haw. c. 25. s. 108. (f) See 2 Haw. c. 25. s.

(c) Cro. Eliz. 697. See also 109.

(g) 2 Haw. c. 25. s. 106.

which it is founded, it is next to be seen how the offence is to be described.

1st. In reference to the circumstances mentioned in the statute.

2dly. In relation to the language used by the legislature.

In the first place, all the authorities concur in asserting, that all the circumstances contained in the statutable definition of the offence must be set out on the record.

*Lord Hale* says, "those circumstances mentioned in the statute to make up the offence, shall not be supplied by the general conclusion." (i)

"The indictment," says *Staundforde* (k), "must set forth the offence in such manner as it is expressed in the statute; otherwise the offender shall have his clergy."

So *Mr. Justice Foster*—"It is a general rule, that all indictments on penal statutes, especially the most penal, must pursue the statute so as to bring the party precisely within it, and this rule holds, as well with respect to statutes which take away clergy from felonies at common law, as to statutes creating new felonies" (l).

And again the same learned judge observed—"Cases might be cited without number, which turn upon this general principle, that indictments upon penal statutes must strictly pursue the statute (m)."

And, therefore, a man (n) indicted of robbery, in *quâdam viâ regiâ pedestri ducente de London ad Islington*, had his clergy, for the words of the (o) statute are "for robbery in or near the highway, he shall be ousted of his

(i) 2 Hale, 170. See also	(m) Fost. 424.
Hale, 517, 525, 535. Brooke's	(n) 38 H. 8. Moore, n. 16.
case, Hard. 20.	p. 5.
(k) Fo. 130. b.	(o) 23 H. 8. c. 1.
(l) Fost. 423.	

clergy," and therefore the indictment and conviction must be of a robbery *in vel propè altam viam regiam* (p).

So an indictment in a præmunire, for aiding one being a principal maintainer of the see of Rome against the form of the statute, the words being omitted, "to the intent to set forth the authority, &c." which were part of the qualification of the offence contained in the statute, was holden to be insufficient and not aided by the conclusion (q).

An indictment under the stat. 7 G. 2. c. 21. stated, that the defendant in and upon one *A. Gillespie*, unlawfully, maliciously, and feloniously, did make an assault; and him the said *A. G.* then and there unlawfully and maliciously did menace, by then and there threatening and menacing to blow the said *A. G.*'s brains out, with a felonious intent, the monies of the said *A. G.* from the person and against the will of him the said *A. G.* feloniously to steal, &c.

The statute enacts, that if any person shall, with any offensive weapon or instrument, unlawfully and maliciously assault, *or* shall by menaces, *or* in any forcible or violent manner, demand any money, goods, or chattels, from any person or persons, with a felonious intent to rob or commit robbery, &c. then, &c.

The judges were of opinion, that the indictment was insufficient in not having stated, that the assault was made with an offensive weapon, *or* that any demand was made; and that, therefore, no judgment could be given on it, for that it is necessary in point of law, that an indictment on any particular act of parliament should strictly follow the words of the act, and that the court

(p) 1 Hale, 535.

(q) Dyer, 363. 2 Hale, 193.

cannot supply from any other circumstances a sufficient description of the offence (*g*).

And the same rule applies with equal or greater force to the pleading in convictions; as where a conviction charged the defendant with killing deer in a certain place where they have been usually kept, without saying *in-closed place* (*h*); or with unlawfully killing fish, omitting to add, "*without the consent of the owner of the water*" (*i*); or with insuring a ticket in the lottery, without saying "*in the state lottery*" (*k*); or with having a gun in his house, where the words of the statute are, "*use to keep in his or her house*" (*l*).

By 3 & 4 W. & M. c. 1. if a man be indicted of stealing any goods or chattels, he shall be excluded from the benefit of clergy, if it appear upon *evidence* or *examination* before the justices, that the said goods or chattels were taken by robbery or burglary, or in any other manner, in any other county, whereof if such person had been convicted by a jury of the said other county, he or they are excluded by virtue of this or any other act from having the benefit of his or their clergy (*m*).

It is not necessary (*n*) under this statute to make any entry upon the record, that it appears by such evidence or examination that the felony was originally commenced in a different county, and was of such a nature that the offender could not have his clergy; but it is usual to write in the margin of the indictment, that it is for a robbery, &c. in another county.

(*g*) R. v. Jackson and Randall, Leach, 303. See also 2 Hale, 189, 190.

(*h*) Ld. Ray. 791.

(*i*) 2 Burr. 679.

(*k*) 1 T. R. 222.

(*l*) 1 Show. 48.

(*m*) See also 25 H. 8. c. 3. and 5 & 6 Ed. 6. c. 10.

(*n*) And. 114. 2 Hale, 518.

But it has been holden, that the offence laid in the indictment and proved, must be one in which the offender stands in need of clergy; for otherwise, having no need to demand clergy, he cannot be hurt by being excluded from it.

So that if he be indicted of petit larciny, he is not ousted of clergy, though the goods be proved to have been burglariously stolen by the offender in the foreign county (o).

It has already been considered, how far it is necessary to bring the defendant within any mere negative description contained in a statute (p).

With respect to provisos and exceptions, the rule is clearly laid down by Lord Hale, "Where an offence is made felony, or otherwise punishable by act of parliament, though the indictment must take in the circumstances which, *in the body of the act*, make up the offence, yet if, by proviso in the same statute, or by any subsequent statute, some cases or circumstances are excepted out of the act, the indictment need not mention them, and qualify the offence so as to exempt it out of the proviso; but the party shall have the benefit of the proviso by pleading not guilty, and in the same manner shall have advantage of the subsequent statute to excuse him by virtue of that statute (q). And this has been adjudged even in cases where the proviso is noticed in the purview of the statute (s); in a conviction (t) it has been holden necessary to notice the proviso's of the statute; yet even

(o) Moor, 550. 1 Hale, 536. (s) Popham, 93, 94. 2 Haw. 2 Hale, 349. c. 25. s. 113.

(p) Vide supra, 159. (t) 2 Haw. c. 25. s. 113.

(q) 2 Hale, 170. Popham, Doug. 531. 93, 94. 1 Jones, 157. 1 Lev. 26.

if the benefit be given by a proviso subsequent to the enacting clause, it is unnecessary to notice it (*u*).

It has been said, that if the statute, whereon an indictment is founded, be particularly recited, the general conclusion *contra formam statuti*, after the allegation of the fact, will supply an omission in it of a circumstance mentioned in the statute, which omission would otherwise have been fatal; for that since the statute is particularly recited, and the defendant is charged with having committed the offence against the form of it, and it is impossible that he could have so done, if any circumstance expressly required by the statute had been wanting, the offence may be said to be as fully set forth in the very words of the statute, as if such words had been repeated in the allegation of the offence (*x*).

But this reasoning appears to be defective; for if the omission of one material circumstance could be supplied by the recital, why might not the omission of a second, and where could the line be drawn? the principle, once admitted, would lead to the conclusion, that an indictment would be sufficient which barely recited the statute, and then averred that the defendant at such a time and place transgressed it.

It would also be left to the jury to say, whether the fact omitted on the record, but proved in evidence, was a fact the doing of which could be an ingredient in the offence, which is a pure matter of law, and ought to appear judicially to the court. And besides this, there could be no averment of time and place annexed to the circumstance omitted. Now, if the circumstance had been averred, it must have been averred with time and place;

(*u*) 2 Str. 1101.

2 Haw. c. 25. s. 114. Roll.

(*x*) Savil, 33. 2 Roll. 227.

81. contra.

and if the omission of time and place to the averment would have vitiated the indictment, it can scarcely be contended, that the omission of the averment altogether would improve the indictment.

Where the prohibiting statute is recent, it is usual to allege expressly, that the offence was committed after the making of the statute; but where the statute is not recent, this averment is unnecessary (y). Where a particular time is limited for the prosecution, it should appear, on the face of the indictment or conviction, that the prosecution was commenced within the time, but a special averment is not necessary (z).

Where several circumstances are mentioned disjunctively in a statute, any one of which is sufficient to oust the offender of his clergy, it is sufficient to charge the defendant *disjunctively* in the indictment. Thus, it was holden to be sufficient, in an indictment for a highway robbery, to aver in the words of the statute, that it was committed in *or* near the highway; because, as has been said, the words are only descriptive of the manner (a).

2dly. *As to the terms and phrases used in the statute.*

The general rule is, that the defendant must be brought within all the material *words* of the statute; for many of these have been holden to be so peculiarly descriptive of the offence, that they cannot be dispensed with (b).

(y) 1 Saund. 1 Burr. 366. averment be made, a variance

(z) 2 East, 333. from it will not be fatal. War-

(a) 1 Hale, 535. It is not necessary now to allege, that the robbery was committed in or near an highway, since clergy is ousted generally; and if the

Warde's case, East. P. C. 785.

Pye's case, ib. (b) Fost. 424. Cro. J. 607.

Stowe's case.



And this rule applies equally to offences created by a statute and to common law offences, for which the offenders are by a statute either subjected to a new punishment, or deprived of a common law benefit; in the former case, if such a material word be omitted, the offender cannot be punished at all; in the latter, he is liable to the common law penalty only.

For example, in an indictment for perjury under the stat. 5 Eliz. c. 9. the word *wilfully* is essential, and must be inserted; because the word *wilful* in the statute is a material description; but in an indictment at common law, and not on the statute, the words, falsely, maliciously, wickedly, and corruptly, imply that the offence was committed *wilfully*, so that an indictment at common law would be good without such an allegation (c).

An indictment (d) under the Black Act stated, that the defendant with a certain pistol, &c. did unlawfully, maliciously, and feloniously shoot at one A. B.

The words of the statute are, "If any person or persons shall *wilfully* and maliciously shoot, &c." The question for the judges was, whether the indictment was not defective for having omitted the word *wilfully*.

According to the report of this case, the point was much debated; some of the judges thought, that the word *wilful* was implied in the word malicious; but a great majority were clearly of opinion, that as the legislature had, by the special penning of the act, used both the words *wilfully* and maliciously, they must be understood as a description of the offence; and that the omis-

(c) R. v. Cox, Leach, 82. 201. 2 Hale, 187. Show. 190.  
See Hetl. 12. Cro. Eliz. 147. 3 Ins. 167.

(d) R. v. Davis, Leach, 556.

sion in the indictment before them was fatal to its validity (e).

So necessary has it been deemed to pursue precisely the language of the statute, that the indictments against the regicides alleged the compassing and imagining of the king's death as the treason, in the terms of the statute, and merely alleged the actual destruction of the king as the overt act (f).

In some instances, however, the use of the identical words used by the legislature has been dispensed with, and their place holden to be supplied by expressions deemed to be equivalent. Thus it has been holden, that the words "wilful murder" might be supplied by laying the killing to be of malice aforethought. So in *Lodowick v. Grevil's case* (g) it was holden, that the words of the indictment, "excite, move, and procure," were equivalent to the words of the statute (h), "counsel, hire, or command."

And in a proceeding founded upon a remedial statute, it has been holden to be unnecessary to follow the words of the statute so precisely as in an indictment (i).

In Mr. Justice Foster's report of the case of the King -v. M'Daniel and others, he says, in the case cited (k), the indictment was holden to be sufficient, though the words

(e) See also 1 Show. 190. (f) Kel. 8. 1 Hale, 107. 119.  
11 Co. 58. 2 Hale, 192. 2 167. Fost. 193. 196. 3 Ins. 12.  
Haw. c. 25. s. 110. Cro. Eliz. (g) And. 195.  
147. 201. And. 49. Dyer, 363. (h) 4 & 5 Ph. & M. c. 4.  
2 Burr. 679. 5 T. R. 170. (i) 2 Bl. R. 842. 3 Wils.  
2 Leon. 211. Hale, 517. 525. 318. 3 East, 244.  
535. 2 Hale, 336. Hard. 21. (k) 1 And. 195.  
8 T. R. 536.

of the statute of Ph. & M. were not pursued; the words, *excitavit, movit, et procuravit*, being deemed tantamount to the words of the statute, "counsel, hire, or command (*l*)."

"I take this to be good law, though I confess it is the only precedent I have met with where the words of the statute have been totally dropped; and I the rather incline to this opinion, because I observe that the legislature, in statutes made from time to time concerning accessories before the fact, hath not confined itself to any certain mode of expression, but hath rather chosen to make use of a variety of words, all terminating in the same general idea."

But if the words of the statute may be abandoned in describing an accessory before the fact, and can be supplied by equivalent words, there seems to be no sufficient reason, why the doctrine of substitution should not extend to other cases.

The reasoning used by Mr. Justice Foster seems carried a great length, and to support it, two steps are necessary: first, the words of a whole class of statutes are construed to be descriptive of an accessory before the fact; and, secondly, it must be contended, that such an accessory may be described in the language of the common law, without reference to the terms of the statute. It appears, indeed, that the part of the report, from which the above extract is taken, was not delivered in court; so that the dictum which has been cited, does not bear the same stamp of authority with a position publicly and judicially advanced by so able a judge (*m*).

Great difficulty exists in drawing the precise line, which

(*l*) 4 & 5 Ph. & M. c. 4.

(*m*) Vide 6 East, 417.

shall ascertain at once the latitude which ought to be permitted in the description of offences for the purposes of justice, and that wholesome caution and strictness, which ought to be observed for the avoiding of confusion, and the exhibiting of the defendant's guilt with certainty upon the face of the record; in order that substantial justice may not be frittered into empty form on the one hand, and that the life and liberty of the subject may not be placed in jeopardy by ignorance or carelessness on the other. But, at all events, where an indictment is founded upon a statute, reason and convenience seem to require, that the terms and expressions used by the legislature, as descriptive of the offence, should be adopted in framing that indictment; the insertion of others does not seem justifiable on any principle; for a substituted word or phrase can never so directly and pointedly support the charge as the one used by the legislature.

III. *Of the averment that the offence was committed against the form of the statute.*

The necessity for this averment may be considered,

1st. In cases affected by one statute only.

2ndly. In those affected by more than one statute.

*If an offence did not exist at common law, but is entirely created by a statute*, it seems, from all the authorities, to be necessary to aver the offence to have been committed *contra formam statuti* (*o*), and that, in default of such an averment, no judgment can be given against the defendant (*p*). And the rule is the same where an offence at

(*o*) 2 Haw. c. 25. s. 117. (*p*) 2 Haw. c. 25. s. 116. 2  
2 Hale, 192. 1 Saund. 135. Hale, 192. 251. 1 Saund. 135.  
n. 3. Doug. 428. 5 Mod. n. 3. Doug. 428.  
307.

common law is made an offence of an higher nature, by a statute, as where a misdemeanor is made a felony, or a felony treason (q).

*Where the offence existed at common law, but the offender is, under particular circumstances, deprived by a statute of some benefit to which he was entitled at common law, the averment is unnecessary, for the statute does not inflict a new punishment, neither does it alter the nature of the offence (r). But the averment in such case would not be improper; for though the statute does not inflict a new penalty, it takes away an old privilege (s).*

So under the statute 21 J. 1. c. 27. it was holden to be unnecessary to conclude against the form of the statute, for the act created no new crime, but only introduced a new rule of evidence (t).

*Where the offence existed at common law, and an additional punishment is inflicted by the statute, the offender, if this averment be omitted, is liable to the common law punishment, but not to the new penalty under the statute (u).*

*Where the offence existed at common law as declared by a statute, such as the stat. 25 E. 3. de proditionibus, the averment may be either used or omitted (x).*

*Where an offence, as described in the indictment, is punishable at common law only, and yet the indictment*

(q) 2 Haw. c. 25. s. 116. R. v. Clerk, Salk. 370.

(r) 2 Hale, 190. 1 Saund. 135. a. n.

(s) 2 Hale, 190. Page v. Harwood, Aleyn, 43. Sty. 86, Ld. Ray. 150. 1 Salk. 212.

(t) 2 Hale, 190. 288. 2 Haw. c. 46. s. 43. Kel. 32.

(u) 2 Hale, 190. 1 Saund. 135. 2 Roll. Ab. 82.

(x) 2 Hale, 189.

avers it to have been done against the form of the statute, it seems to have been doubted whether the indictment was good at common law. Lord Hale was of opinion, that if the offender were not brought within the words of the statute, if the indictment concluded *contra formam*, it should be quashed, though an offence be described which is indictable at common law (x).

As if a man be indicted for drawing his dagger in the church, upon J. S. *against the form of the statute*, but the indictment omit the words, "with intent to strike (y)," the indictment will be quashed.

But in numerous instances the conclusion has been holden to be mere surplusage (z).

Where several statutes related to the same offence, it was formerly holden that it ought to be laid to have been committed *contra formam statutorum*, and it is seriously recommended, by great authorities, to lay the offence *contra formam statut.* which might be taken either in the singular or the plural as the case required;—this piece of precaution was rendered unavailable by the statute which prohibits the use of abbreviations in indictments. In the case of *Hothbury v. Levingham* (a), it was holden, that a conclusion *contra formam statuti* for taking *averia caruæ* was good, although the offence was prohibited by each of two statutes.

(x) 2 Hale, 171.

(y) Cro. Eliz. 231. Penhallo's case, Cro. Eliz. 307. 697.

(z) Say. 225. 2 Haw. c. 25. s. 115, 116. Al. 43. 2 Hale, 191. 1 Salk. 212. Cro. Eliz.

231. 5 T. R. 162. R. v. Mathews, Leach, 664. R. v. Wigg, 2 Ld. Ray. 1163. 4 T. R. 202. 1 Saund. 135. n. 3.

1 Ld. Ray. 149.

(a) 1 Sid. 348. R. v. Collins, Leach, 670. Ow. 135.

A distinction has been made between the case of an offence prohibited by each of two statutes, and those where an offence is punishable by virtue of two statutes taken together, and not by virtue of either singly. As where by a subsequent statute it is enacted, that the former shall be executed in a new case, or that an additional penalty shall be inflicted. But, according to later opinions, a conclusion in the singular would in the latter instances be sufficient (*b*).

If a temporary act be made perpetual by a second, a conclusion in the singular will be sufficient (*c*). So if a statute which has expired be revived by another, it seems that a conclusion in the singular is sufficient; though, according to Lord Hale, it is safer to conclude in the plural (*d*).

If one statute adopt and continue the provisions of a former, the indictment must conclude in the singular (*e*), and the former statute is continued, though the continuing statute make some alteration (*f*). So where the statute is continued in part (*g*).

Where one statute creates the offence, and another adds the penalty, the indictment ought to conclude against both (*h*). But it would be sufficient, in such case, to allege the offence to have been committed against the form of the statute, and to conclude whereby and by force of the statute, &c. (*i*).

Where the indictment is founded upon one statute

(*b*). 2 Haw. c. 25. s. 117

(*g*) Cro. Eliz. 750.

(*c*) 2 Hale, 173. 2 Haw.

(*h*) 2 East, 339. Ow. 135.

c. 25. s. 117.

Cro. Eliz. 750. 2 Hale, 173.

(*d*) Mill's case, 2 Hale, 173.

Cro. J. 142.

(*e*) Saund, 135. n. 3.

(*i*) 7 East, 517.

(*f*) Str. 1066. 1 Lut. 312.

2 Saund. 377. n. 12.

which is explained by several others, it should conclude in the singular (*k*). So where a second statute merely regulates the operation of the first (*l*).

It has been holden, that where the plural word statutes is used instead of statute in the singular, the indictment will be insufficient (*m*): as if a second statute merely continue a former one, without making any addition to it or altering the substance of its purview.

(*k*) 2 Saund. 377.

(*l*) Cro. J. 187.

(*m*) 2 Haw. c. 25. s. 117.

Cro. Car. 187. Yel. 116. but  
see 2 Hale, 173.



## CHAP. XIII.

*Caption of an Indictment.*

WHERE an inferior court, in obedience to a writ of certiorari from the King's Bench, transmits the indictment to the Crown Office, it is accompanied with a formal history of the proceeding, describing the court before which the indictment was found, the jurors by whom it was found, and the time and place where it was found. This instrument, termed a schedule, is annexed to the indictment, and both are sent to the Crown Office.

The history of the proceedings, as copied or extracted from the schedule, is called the *caption*, and is entered of record immediately before the indictment.

Lord Hale gives a precedent of a caption in the following form (a) :

“ Norfolk.—At a general sessions of the peace holden at S. in the county aforesaid, on the fifth day of October, in the twenty-fifth year of the reign, &c. before A., B., C., D., and their fellows justices of our said lord the king, assigned to keep the peace of our said lord the king, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed, by the oath of E., F., G., H., &c. good and lawful men of the said county, sworn and charged to inquire for our said lord the king, and the body of the said county it is presented, &c.”

(a) 2 Hale, 165.

*In the first place it must appear that the court had jurisdiction (b).*

If, therefore, the caption merely set forth that it was holden before J. S. steward, without shewing to whom he is steward, or in what court, or that an inquest of death upon view of the body before J. S. or without adding that he was a coroner, and shewing also that he was a coroner for the district in which the inquest was taken, it will be insufficient (c). But it would be sufficient to say coroner *in* the county, for the court will intend that he is coroner for the whole county (d).

It has been holden sufficient to allege the indictment to have been taken at a general sessions of the peace of such a county (e), but insufficient to allege it to have been taken at a general sessions holden *in* such a county, instead of saying for such county (f).

The caption ought to notice the authority of the justices to hear and determine divers felonies, &c. (g).

It was formerly deemed necessary to describe the justices either as the king's justices or as justices of the public peace, but it has since been holden to be sufficient to describe them as justices of the peace (h).

But it is not sufficient to describe them generally as justices of the peace, &c. without either naming them or shewing for what division they are justices; and where in their description as justices *assigned* to keep the peace, &c. the word assigned was omitted, the caption was

(b) Ld. Ray. 710. 22 E. 4. (f) 1 Keb. 329. 668. 1  
12. Summ. 207. Cro. Eliz. Lev. 304. 2 Keb. 133. cont.  
193. 2 Roll. 82. Plow. 76, 77. 1 Keb. 635. Qu. and see 2  
4 Co. 41. Haw. c. 25. s. 121.

(c) 2 Haw. c. 25. s. 119.

(g) Str. 442. 2 Haw. c. 25.

(d) Ib.

s. 121. 2 Hale, 166.

(e) 1 Sid. 247.

(h) 2 Haw. c. 25. s. 122.

holden to be defective (i). But it is unnecessary to allege that the justices of the general quarter sessions were of the quorum (k).

It is a general rule, that the title of their authority should be set forth, as that they were justices of the peace, &c. justices of gaol delivery, &c. (l).

If a session be holden by virtue of several commissions, as of gaol delivery, oyer and terminer, and the peace, and the record be made up as upon all three commissions the caption will be good, if the justices had authority to take the indictment by one of those commissions though not by the others (m).

But a caption setting forth that the indictment was taken *ad magnam curiam cum letâ tentam* is vicious, though *ad magnam curiam et ad letam* would be sufficient, for *cum letâ* does not describe any court possessing jurisdiction. So it would be sufficient to allege that it was taken at a court leet, holden with a court baron; but it would be otherwise, if both courts had jurisdiction and proceeded in different ways (n).

The caption of an indictment at a court leet, need not shew how the court was constituted, whether by grant or prescription; but this appears to be necessary where the indictment has been taken by virtue of a special commission (o).

The justices' names should be set out, and though it is not necessary to mention all, yet so many should be named as are enabled, by their commission, to take an indictment (p). But though no sessions can be held unless before one of the quorum, it is unnecessary to

(i) 1 Saund. 263.

(k) 2 Haw. c. 25. s. 123.

(l) 2 Hale, 166.

(m) 2 Hale, 166. 9 H. 7. 9.

(n) 1 Salk. 195. 2 Haw. c.

25. s. 124.

(o) See the Caption, *Fost.* 3.

(p) 2 Hale, 166.

state that any were of the quorum (*y*). But this is doubted by Lord Hale, where an act expressly requires, that the offence shall be heard and determined before two justices of the peace, one of whom is of the quorum (*z*).

*Description of the jurors.*

The caption must further shew, that the indictment was found by twelve jurors of the county, city, or place, for which the court was holden (*a*). The precedent cited from Lord Hale, states the names of the jurors; but though it certainly is necessary that the names of the jurors should be returned in the *schedule*, yet in making up the record in the King's Bench, it has been the constant practice in the Crown Office to omit the names of the jurors in the caption (*b*). And it has been solemnly decided, that it is unnecessary to insert their names in the caption (*c*), though this was formerly doubted (*d*); but the caption must shew, that the offence was presented by *twelve* jurors (*e*). It should appear that they were *sworn* and *charged*, but the omission of the latter word will not be fatal (*f*). It has been holden necessary to allege, that they were *then and there* sworn and (*g*) charged, and for what county or division (*h*). And it must appear, that they acted under the obligation of an oath; and, therefore, the caption should not only allege, that they were *sworn* (*i*), but also that they made their presentment upon *oath*; but it has been holden, in

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|---|--------------------------------------|
| ( <i>y</i> ) 2 Hale, 167.               | ( <i>d</i> ) 2 Haw. c. 25. s. 126.   |
| ( <i>z</i> ) 2 Hale, 167.               | ( <i>e</i> ) Cro. Eliz. 654. 2 Hale, |
| ( <i>a</i> ) Ld. Ray. 434. 2 Hale,      | 167. 1 Saund. 248. n. 1.             |
| 167. 2 Keb. 160. 3 Keb. 807.            | ( <i>f</i> ) 2 Haw. c. 25. s. 126.   |
| ( <i>b</i> ) 1 Saund. 216. n. 1.        | ( <i>g</i> ) 2 Haw. c. 25. s. 126.   |
| ( <i>c</i> ) Aylett's case in the House | ( <i>h</i> ) Ib.                     |
| of Lords, July 6, 1786. R.              | ( <i>i</i> ) 1 Sid. 140. 1 Keb. 498. |
| v. Atkinson, 1 Saund. 248.              | 2 Haw. c. 25. s. 126.                |
| n. 1. Ib. 249. n. 1.                    |                                      |

some instances, that the words, "present upon their oath," supply the place of the words "sworn and charged (*l*); and, probably, this would now be holden sufficient in all cases. It is unnecessary to describe them as *probi et legules homines*, for this is a necessary intendment of law.

*The time when.*

The caption must recite the day and year when the court was holden, and usually alleges the indictment to have been then taken in the present tense (*m*). If the indictment be taken at an adjourned sessions, it should be shewn when the original sessions began (*n*); and if an improper, uncertain, or impossible day be laid, it will vitiate the indictment (*o*). As where the sessions were alleged to have been holden *ad Festum Epiphaniæ* instead of *Epiphaniæ*, for *Epiphanius* is a saint in the Roman calendar; and, therefore, it appeared, that the sessions were holden at a time different from that appointed by the statute (*p*).

*The place of taking the indictment.*

It must be shewn, that the indictment was taken at some place within the county or division for which the jurors are returned; for otherwise they would have no authority to inquire (*q*). It is usual, as in the above precedent, to state in the margent of the caption, the county, city, or division, for which the jurors inquire; but this is not of necessity any part of the caption (*r*). But if the county or division be so named in the margent, it is not absolutely necessary to repeat it in the body of the cap-

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| ( <i>l</i> ) 1 Keb. 629. 2 Haw. c. 25.                          | ( <i>n</i> ) Str. 865.                |
| s. 126.   | ( <i>o</i> ) 1 T. R. 316. 2 Keb. 582. |
| ( <i>m</i> ) 4 Co. 48. Yet qu. whether this be necessary; see 1 | ( <i>p</i> ) R. v. Warre, Str. 698.   |
| T. R. 316. and R. v. Hall, 1                                    | ( <i>q</i> ) See chap. 1. and 2 Hale, |
| T. R. 320.  | 166.                                  |
|   | ( <i>r</i> ) 2 Hale, 166.             |

tion, though it is usual and more correct to do so (r). If the county named in the margent be not repeated in the body of the indictment, express reference must be made to it by the words in the county aforesaid (s). If the caption state no place, or an uncertain one, it will be vicious (t): as if it set forth, that the indictment was taken at a sessions holden at B. without shewing in what county B. is (u). So if, by act of parliament, the quarter sessions shall be holden at a particular place, and *not elsewhere*, the caption must shew the sessions to have been holden at that place (x). But in Long's case (y), a coroner's inquest was stated to have been taken at Cossam, before W. S. the queen's coroner, within the liberty of her town of Cossam aforesaid; and this was holden to be sufficient, without expressly shewing that Cossam was within the liberty of the town of Cossam,

*Conclusion of the caption.*

It seems formerly to have been the custom to conclude in this form, "it is presented that A. B. &c."; but the more correct form seems to be this, "It is presented in manner and form following, that is to say, Lancashire, to wit, the jurors for our lord the king, &c." and then to copy the whole of the indictment *verbatim*.

And where the county or division is mentioned in the margent of the indictment, and the place mentioned in the body of the indictment is referred to the county in the margent by the words in the county aforesaid, it seems to be necessary to introduce the indictment according to the latter method; for otherwise the indict-

(r) 1 Will. Saund. 308. R.  
v. Kilderley, n. 1.

(s) 2 Hale, 180. 3 P. Wms.  
439. *supra*, p. 60.

(t) Cro. J. 276.

(u) Cro. Eliz. 137. 606. 738.

(x) 1 Haw. c. 25. s. 128.

(y) 5 Co. 120.

ment would appear to be insufficient, for referring the place mentioned in it to the county *aforesaid*, no county having been previously mentioned (z). But regularly the county mentioned in the margent is not an essential part of the record, unless it be made so by an express reference to it in the body of the caption, or of the indictment itself (a).

(z) See p. 60. and 1 Saund. (a) 2 Hale, 165, 166.  
308. n. 1.

## CHAP. XIV.

*Defective Indictment.*

- I. *Language of Indictments*, p. 229.
- II. *Indirect, uncertain, double, and indefinite Allegations*, p. 231.
- III. *Repugnancy—Doctrine of Surplusage—Use of a Videlicet*, p. 234.
- IV. *Variance*, p. 241.

“ IN favour of life great strictness has at all times been required in point of indictments; and the truth is, that it is grown to be a blemish and inconvenience in the law and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments than by their own innocence; and many times, gross murders, burglaries, robberies, and other heinous and crying offences, escape by these unseemly niceties, to the reproach of the law, to the shame of the government, to the encouragement of villainy, and to the dishonour of God. And it were fit, that by some law this over-grown curiosity and nicety were reformed, which is now become the disease of the law, and will, I fear, grow mortal, without some timely remedy (a).”

Such were the observations of Lord Hale upon the niceties and refinements, which a mistaken and misplaced humanity had ingrafted upon this branch of the law.

But although this *disease* has not been cured by any general and amending statute, the courts have relaxed much from their former strictness in construing indict-

(a) 2 Hale, 193.



ments; and many exceptions, formerly holden fatal, would in later times have been disregarded (*b*).

The salutary maxim, "*nimia subtilitas in jure reprobatur*," has been applied to criminal as well as civil proceedings, and trifling exceptions have been frequently overruled (*c*).

Every indictment, indeed, must contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy; but, except in particular cases, where precise technical expressions are required to be used, there is no rule that any other words shall be used than such as are in ordinary use, or that, in indictments or other pleadings, a different sense is to be put upon them than what they bear in ordinary acceptation. And if, where the words may be ambiguous, it is sufficiently marked by the context, or other means, in what sense they are to be used, no objection can be made on the ground of repugnancy, which only exists where a sense is annexed to words, which is either absolutely inconsistent therewith, or being apparently so, is not accompanied by any thing to explain or define them (*d*).

According to Lord Coke (*e*), *certainty, to a certain intent in general*, is required in a charge or accusation. This definition, it must be confessed, is not very intelligible; but, as explained by Lord C. J. De Grey (*f*), "The charge must contain such a description of the crime, that the defendant may know what crime it is, which he is called upon to answer; that the jury may appear to be

(*b*) See 2 Ld. Ray. 1169.

the case of *R. v. Stevens and Agnew*, 5 East, 359.

(*c*) 2 Haw. c. 25. s. 61.

(*d*) Per Ld. Ellenborough, C. J. in giving judgment in

(*e*) 1 Ins. 303. 5 Co. 121.  
(*f*) Cowp. 682.

warranted in their conclusion of guilty or not guilty, upon the premises delivered to them; and that the court may see such a definite crime, that they may apply the punishment which the law prescribes."

It is essential to the *formal* validity of an indictment,

1. That it be couched in plain and intelligible language and characters.

2dly. That it contain a direct, positive, single, and definite charge.

3dly. That such charge be described without inconsistency, or repugnancy, or material variance from the facts of the case.

In the first place, the charge must be conveyed in plain and distinct language and characters.

By the stat. 4 G. 2. c. 26. all writs, process, pleadings, rules, indictments, records, and all proceedings, in any courts of justice within England, shall be in the English tongue, and shall be written in such common hand as acts of parliament are usually ingrossed in; the words and lines to be written at least as close as the said acts usually are, and not abbreviated.

And by the stat. 6 G. 2. c. 14. all pleadings, rules, orders, indictments, and informations, &c. may be written or printed in a common hand, and with the like manner of expressing numbers by figures as have been commonly used in the said courts, and with such abbreviations as are used in the English language.

Whilst such proceedings were in Latin, the courts seem to have been very jealous of the introduction of English words into indictments; and it was holden, that if the description could properly be made by means of a Latin word or phrase, the latter could not be supplied by English words under an *Anglicè* (g); and therefore an in-

dictment was quashed, because the English word witchcraft was substituted for the Latin word *incantatio* (*h*).

But even then, when more slender exceptions were allowed to prevail than in later times, it appears that neither inelegant, nor even ungrammatical or false Latin, would vitiate an indictment if it did not render it unintelligible (*i*).

So that where *duo justiciariis* was inserted for *duobus justiciariis* (*k*), the indictment was still holden to be sufficient; and so was an indictment, which alleged that the defendant *super caput suum proprium* did forge, meaning that he did it of his own head (*l*).

But the misspelling of a word of art was generally considered to be fatal, as *burgariter* for *burglariter*, *feloniter* for *felonice*, or *murdredavit* for *murdravit*; and in numerous other instances, indictments were quashed upon very trivial exceptions to their language, as where *destructionem* (*m*) was used for *destructionem*; in others, the fault was holden to be cured by an explanation under an *Anglice*, as *pellices*, *Anglice* (*n*) skins; *ollis æriis* (*o*), *Anglice* brass pots. But the consideration of this class of cases is rendered useless by the statutes above cited. With respect to faulty or ungrammatical English, the courts have relaxed from that strictness, which was formerly so prejudicial to the administration of justice. If the objectionable word or sentence be wholly superfluous, it may be entirely rejected (*p*), according to the

(*h*) Dr. Lamb's case, 2 Hale, 169.

(*i*) 2 Hale, 169.

(*k*) Cro. Eliz. 108. 2 Hale, 169.

(*l*) 2 Ley. 221. 2 Haw. c. 25. s. 87.

(*m*) Parker's case, Hutt. 56.

(*n*) 1 Sid. 318.

(*o*) Cro. J. 129. 2 Haw.

c. 25. s. 88.

(*p*) 2 Haw. c. 25. s. 87.

maxim, *utile per inutile non vitiatur*; and if one or more material words be misspelt, still the indictment will be good; unless by the alteration the word be changed into another of a different signification (*p*).

It seems, that before the statutes 4 G. 2. c. 26. and 6 G. 2. c. 14. it was not allowable to express the year by means of common figures (*q*); but in setting forth the *tenor* of any writing in an indictment for forgery or libel, it is *still* necessary to copy the figures (*r*).

*The charge must be direct and positive.*

It has frequently been holden, that it is insufficient to allege a material part of the charge by way of recital, prefacing it with the words, "for that whereas, &c."; therefore, where an indictment against the defendant, for having disobeyed an order of two magistrates, averred, that *whereas* the justices made an order, &c. the indictment was holden to be insufficient, for not directly averring that such an order was made, for without the order there could be no offence (*s*). But where the matter laid under a *quod cum* is *merely introductory*, the allegation will be sufficiently certain: thus an indictment for forgery, which alleged *quod cum testatum existit per quandam indenturam*, that J. S. demised, &c. and then averred, that the defendant falsely forged an assignment in writing of that lease, setting out the tenor was holden to be sufficiently certain (*t*).

In Long's case (*u*) it was holden, that the averment

(*p*) R. v. Beech, Leach, 158. Salk. 371. 2 Haw. c. 25. s. 60.  
Cowp. 230. 4 Co. 42. 5 Co. 150.

(*q*) Vide supra, 93. (*t*) R. v. Goddard and Carle-

(*r*) 2 Haw. c. 25. s. 87. 1 ton, 3 Salk. 171. Ld. Ray.  
Salk. 195. 1 Mod. 78. 1194. 2 Str. 904. Com. Dig. Ind.

(*s*) R. v. Crowhurst, Ld. (*u*) 5 Co. 122. but see Ld.  
Ray. 1363. R. v. Whitehead, Rayd. 1363.

*quod exoneravit tormentum dans plagam*, without saying *percussit*, was insufficient; and in Vaux's case (y), an indictment, alleging *quod nesciens potum fore venenatum bibit*, was holden to be vicious, for not saying expressly *venenum bibit*.

Where the character or situation of the defendant is an essential ingredient in the offence, it is sufficient, as has already been seen, to aver that he being so and so did the act, since no ambiguity can arise; but to allege that A. disseised B. of land *existens liberum tenementum* of B. would be bad, because it would be ambiguous whether the land was or was not B.'s freehold at the time of the disseisin (z).

*The charge must be single.*

In a great number of instances it has been holden, that a charge in the disjunctive will avoid the indictment. As that A. *murdravit vel murdrari causavit, verberavit B. vel verberari causavit, fabricavit vel fabricari causavit*, for the charge is ambiguous (a). So it is insufficient, in an indictment for extortion, to allege that A. *existens servus sive deputatus* took, &c. (b).

But it has been holden, that circumstances necessary to bring the defendant within the purview of a statute depriving him of the benefit of clergy, may be disjunctively alleged. As where an indictment for robbery alleged it to have been committed in or near the king's highway (c).

And it is the usual practice to allege offences cumulatively, both at common law and under the description contained in penal statutes. As that the defendant pub-

(y) 4 Co. 44.

900. Rep. temp. Hardwicke,

(z) Bac. Ab. Ind. 556. See

370.

p. 151.

(b) 2 Roll. 263.

(a) 5 Mod. 137. Salk. 371.

(c) 1 Hale, 535.

2 Haw. c. 25. s. 58. 2 Str.

lished *and* caused to be published a certain libel, that he forged *and* caused to be forged, &c. In Fuller's case (c), it was objected that the second count of the indictment comprehended two distinct offences, viz. an endeavour to seduce, entice, and stir up M. L. to commit mutiny, and also an endeavour to seduce, entice, and stir M. L. to commit traitorous and mutinous practices. But as the first count of the indictment was holden to be sufficient, the judges gave no opinion upon the second; Mr. Baron Perryn, however, observed, that it would probably be found to be a sufficient answer to this objection, that though this charge might have been branched out into separate offences, the whole might be but the parts of one fact of endeavour, which must be stated as it is.

And it is the common practice to allege, in the same count of an indictment, the stealing of several articles, though the taking of each would constitute a distinct felony. And if any of these be uncertainly or improperly expressed, the indictment will still be good as to the rest; and in general where an indictment is defective as to some particulars, but sufficient as to the rest, it will be void only as to the first, and remain good as to the residue (d).

On the other hand it is necessary that every distinct count in an indictment should contain a distinct and complete charge; and, therefore, where a statute inflicts a heavier punishment on an offender who commits the offence a second time within a limited period after the commission of the first offence, the indictment (e), to subject the offender to such heavier punishment, must allege the commission of the two offences in the same count (f).

(c) Leach, 916.

(d) 2 Haw. c. 25. s. 74.

(e) R. v. Tandy, Leach,

970.

(f) For instances of *indefinite* allegations, see chap. X.

*Without inconsistency or repugnancy.*

It seems to be clear, that any inconsistency in material allegations, will vitiate the indictment. Thus, an indictment was holden insufficient which alleged the forgery of a writing, by which A. was bound to B. (*f*); "that A. *disseised* B. who had no freehold (*g*);" "that A. murdered J. S. at B. where he was wounded, the death having been laid at C. (*h*);" "the selling by false weights and measures;" "the being absent from church for *six months* between two specified days, which comprised an interval of eleven days only (*i*)."

It frequently happens that an averment faulty, because it is either inconsistent with the fact, or is repugnant to other parts of the indictment, or is in itself insensible and absurd, will not be fatal. For, according to the salutary and equitable maxim, "*utile per inutile non vitiatur*;" and the general rule is, that if the defective averment might, without detriment to the indictment, have been *wholly* omitted, it shall be considered as surplusage, and disregarded (*k*).

Thus, in an indictment for arson, an allegation that the offence was committed in the night-time need not be proved (*l*).

So if an indictment for robbery from the person aver it to have been committed on the high-way (*m*), or in the dwelling-house (*n*) of a person named, it would be unnecessary to prove these allegations, for they form no part of

(*f*) 3 Mod. 104. Bac. Ab. Ind. 556.      (*k*) 2 Haw. c. 25. s. 87. 1 Mod. 78.

(*g*) 2 Haw. c. 25. s. 62. Bac. Ab. Ind. 556.      (*l*) R. v. Munton, East. P. C. 1021.

(*h*) 2 Haw. c. 25. s. 62. 2 Haw. c. 23. s. 88, 89. Hale, 188.      (*m*) Supra, 178. Wardle's case, East. P. C. 785.

(*i*) Ib.

(*n*) Ib.

the legal description of the offence, and might have been wholly omitted without any injury to the charge.

So where an indictment charges an offence, at common law, to have been committed against the form of statute, the conclusion may be rejected (*l*). And *the general rule is*, that all unnecessary words may, on motion in arrest of judgment, be rejected as surplusage, if the indictment would be good upon striking them out (*m*). In Redman's case (*n*) the indictment alleged that the defendant received goods, *knowing the said goods to have feloniously stolen*, and upon motion in arrest of judgment, it was holden that the words *to have* might be rejected. So (*o*) where an indictment alleged that the defendant FRANCIS Morris, the said goods above-mentioned, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have, he the said THOMAS Morris, then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away. And the twelve judges held, that the words, "he the said Thomas Morris," might be struck out as unnecessary, and that the indictment was sensible and good without them.

So where an indictment against a receiver, alleged the stealing of two bank notes, the property of Stephen Sullivan, and charged the defendant with having received the said notes, the property and *chattels* of the said Stephen Sullivan; it was objected that the notes being called

(*l*) R. v. Mathews, Leach, 536. *tamen qu.* 664. 2 Haw. c. 25. s. 115. for the sense is not complete Doug. 445. Cro. Eliz. 750. without the words, *to have* Contra, 2 Hale, 171. but see *been*.

2 Hale, 173.

(*o*) R. v. Edwards and Mor-

(*m*) Leach, 536. 1 T. R. ris, Leach, 127.  
322. Com. Dig. Pleader, C. 28,  
29. F.12. 4 Co. 41. 2 Mod. 327.



property, as to the principal, could not be construed chattels as to the accessory : but the judges were unanimously of opinion, that the word chattels might be rejected as surplusage (*p*).

So where, by a penal statute, the whole of the penalty was given to the informer; it was holden, that an averment in the declaration that an action had accrued to the king, the poor of the parish, and the informer, might be rejected (*q*).

So where an allegation is inconsistent with precedent sensible matter, it may be rejected as surplusage. As if a declaration in ejectment lay the demise on the second of January, and aver that the defendant *afterwards*, to wit, on the first of January ejected him (*r*).

But a material allegation which is sensible and consistent in the place where it occurs, and which is not inconsistent with any antecedent matter, cannot be rejected merely because it is inconsistent with a subsequent material averment. And, therefore, where an indictment for malversation in office, alleged that the defendant, on the 1st of January, 1794, and for a long time thence ensuing, to wit, *until* the 29th of November, 1795, held and exercised the office, &c. and afterwards averred that the defendant, whilst he held and exercised the said office, to wit, *on* the 29th day of Nov. 1795, committed the act charged to be criminal; it was holden that the words under the first *scilicet*, “until the 29th of Nov. 1795,” could not be rejected as surplusage (*s*).

And if a matter be alleged which might have been omitted altogether, but which shews that the complaint

(*p*) R. v. W. Morris, Leach, 324. Holt, 209. See also 2 525. East. P. C. 593. 611. Will. Saund. 291. n. 1. and

(*q*) Andr. 67. Com. Dig. the cases there cited. Pleader, C. 28.

(*s*) R. v. Stevens and Ag-

(*r*) Wyat v. Alaud, Salk. new, 5 East, 244.

is ill founded, it cannot be rejected as surplusage. As where an indictment against one for concealing the death of a bastard child, alleged the presence of an accomplice (*t*). So if a statute, which need not have been recited, be misrecited in a material part (*u*). So an indictment for forgery, which, after setting out the writing, alleged, "by which A. is bound to B." was holden to be defective (*x*).

In Heydon's case (*y*) the indictment alleged the mortal blow to have been struck on the 4th day of August, and the death to have happened on the 19th day of December, and afterwards averred that several other defendants at the time of the committing of the said felony and murder, to wit, on the 4th day of August aforesaid, were present aiding, assisting, abetting, &c. the principal; and it was holden that the indictment was repugnant and insufficient as to the latter defendants, for no felony was committed till the death, and no one can be adjudged a felon by relation. So if the stroke be laid A. and the death at B. an allegation that the defendant murdered the deceased at A. will vitiate the indictment (*z*), although a general averment that the defendant murdered the deceased would have been sufficient.

And Lord Hale, in the case of Duppa v. Mayo (*a*), held, that where that which is averred under a *scillcet* shews judicially that the party pleading *has mistaken the law*, the wrong conclusion in law will render the declaration insufficient, though it might be otherwise where the fact is mistaken.

(*t*) Jane Peat's case, East. P. C. 229. And in declarations surplusage will be fatal, if it shew that the plaintiff has no cause of action, Com. Dig. Pleader, C. 29.

(*u*) Plow. Comm. 84. Com. Dig. Ac. on St. 1.

(*x*) Bac. Ab. tit. Ind. 556.

(*y*) 4 Co. 42. 2 Haw. c. 23. s. 89.

(*z*) Bac. Ab. tit. Ind. 556.

(*a*) 1 Saund. 287.

It is usual in criminal, as well as in civil pleadings, to allege circumstances of time, place, number, quantity, magnitude, &c. under a *videlicet* or *scilicet*, whose office it is to *explain* that which has been alleged before (b).

The use of these terms, in pleading, seems to be comprized within very narrow limits. It has been said, and seemingly with great correctness, that where the time when a fact happened is immaterial, and it might as well have happened at another day, there, if alleged under a *scilicet*, it is *absolutely nugatory*, and therefore not traversable; and if it be repugnant to the premises it shall not vitiate the plea, but the *scilicet* itself shall be rejected as superfluous and void; but where the precise time is the very point and gist of the cause, there the time alleged by the *scilicet* is conclusive and traversable, and it shall be intended to be the true time and no other, and if impossible or repugnant to the premises, it will vitiate the plea, if true, will support the defence (c). These observations seem to contain the substance of all the decisions upon these allegations, and to be equally applicable to every other matter alleged under a *videlicet* (d). A particular allegation is either material or it is not; if it be material it is traversable, and must be as strictly proved when laid under a *scilicet*, as it must have been without one (e), and, when laid under a *scilicet*, cannot be rejected

(b) 2 Wils. 332. Knight v. Preston, Saund. 118. 170. (c) 1 Str. 293. 3 Burr. 1729. 1 Saund. 169. 2 Wils. 332.

(c) By Mr. J. Blackstone whilst at the bar, 1 Black. 590. Pope v. Foster, 5 T. R. 71. The day upon which money is alleged to have been advanced is material, though laid under a *videlicet*, Harris, Mr. Serj. Williams, 2 Will. Saund. 291. n. 1.

(d) See 2 Will. Saund. 291. q. t. v. Hudson, 4 Esp. 152. n. (c).

for the sake of a subsequent material allegation, which is inconsistent with it (*g*). If the allegation does not require strict proof, the absence of a *videlicet* will not render greater accuracy necessary, as to proof of the time, place, numbers, quantity, &c. alleged in the indictment.

It has, indeed, frequently been intimated, that an averment which, if pleaded under a *videlicet*, would not require strict proof, must, without one, be proved as laid; and that, therefore, where a party does not mean to be concluded by a precise sum or day stated, he ought to plead it under a *videlicet* (*h*). But this doctrine must, at all events, be understood with very considerable restrictions; for, it is perfectly clear, that the king is not in general bound by either the day or place laid in the indictment, though averred without a *scilicet*. In prosecutions for murder, a variance from the instrument will not be material, provided the kind of death agree with that which is stated. So, in indictments for extortion, or taking a greater sum for brokerage than is allowed by an act of parliament (*i*), and in many other instances, it is not necessary that the evidence should strictly correspond with the allegation of the sums stated, though they be specified without the aid of a *videlicet*.

Where indeed a fact is averred, which is to be proved by the production of a record or other written in-

(*g*) *R. v. Stevens and Agnew*, 5 East, 244.

(*h*) 2 Will. Saund. 291 *R. v. Aylett*, 1 T. R. 63.

In the case of *Symmons v. Knox*, 3 T. R. 68. the party pleaded, that such a sum was due and *no more*. And in the case of *Durston v. Tatham*,

which was cited in the former, the sum stated without a *videlicet*, and by which the party was holden to be bound, was part of the consideration of the promise.

(*i*) *R. v. Gillham*, 6 T. R. 265.

strument, since it is necessary to aver that fact with time and place, care must be taken not to aver the time and place as descriptive of the record or other instrument; for if such an intention appear, a variance from such time and place will be fatal. And, therefore, to avoid all doubt in such cases, it is proper to aver the time and place under a *scilicet*; which shews unequivocally, that the averments are not used descriptively and substantially, but only formally. Thus, in an action for a malicious prosecution, the declaration averred, that “*afterwards*, to wit, on the morrow of the Holy Trinity, &c. the plaintiff was in due manner and by due course of law acquitted. By the record of *nisi prius* it appeared, that the acquittal took place on Tuesday next after the end of Easter term, yet the allegation was holden to be sufficient (*k*). And in general, whenever an allegation of time, place, magnitude, quantity, or any other circumstance, is necessary, but need not be exactly proved, care should be taken to avoid the use of such terms, as shall bind the prosecutor to a strict proof; and this is usually and technically done, by averring the time, place, or other circumstance, under a *videlicet* (*l*). It seems, however, that this intention may be manifested by other means; and the case of the King v. Gillham (*m*) is strong to shew, that the want of a *videlicet* will not render strict proof necessary of an allegation of any circumstance material in itself, but not otherwise requiring strict proof, where there are no words which show that the allegation

(*k*) Purcell v. Macnamara, K. B. Mich. 48 G. 3. Peake's Evid. 207. In the case of Pope v. Foster, 4 T. R. 590. the day of the trial was holden to be substantial, though laid under a *videlicet*.  
 (*l*) Symmons v. Knox, 3 T. R. 65.  
 (*m*) 6 T. R. 265. and see R. v. Burdett, 1 Ld. Ray. 149. 3 T. R. 632.

was used as descriptive of any contract, record, or other instrument, with which it may be compared, and from which it varies. The defendant was indicted under the stat. 17 G. 3. c. 26. which prohibits any broker, &c. from accepting more than 10s. in every hundred pounds for brokerage, &c. The first count stated, that the defendant received 332*l.* 10*s.* as a gratuity or reward for soliciting and procuring the loan, and for the brokerage of the sum of 2450*l.* then and there advanced, &c. It appeared upon the trial, that the sum of 332*l.* 10*s.* was not received for brokerage *only*, but that part of it was due to the defendant as an attorney for having prepared the writings. But the court was of opinion, upon motion in arrest of judgment, that since the offence consisted in taking more than 10s. in the 100*l.* and that the judgment did not depend on the quantity of the excess, the variance was immaterial.

*Effects of variance.*

It has already been seen, that it is essential to every indictment that it should affect a formal accuracy in the description of persons, time, place, sums, magnitude, quantity, value, &c. (*o*).

But a variance in evidence from the statement, in respect of time, place, magnitude, &c. is never material, unless the time, &c. be of the essence of the offence, provided the description be in substance correct (*p*). And it seems to be a general rule, that wherever an allegation may be wholly struck out of the indictment, without injury to the charge alleged, it need not be proved (*q*).

It has already been seen what variance will be fatal in the description of a statute, public or private (*r*). With respect to the pleading of other documents much depends upon the particular terms in which the indict-

(*o*) See chap. 10.

(*q*) See p. 234. tit. Surplusage.

(*p*) See p. 170. 239.

(*r*) See chap. 12.

ment professes to describe the instrument, and upon the importance of the instrument itself.

For if it be introduced by way of inducement, and merely as collateral to other matter, a substantial description will suffice, and a minute and formal variance will not be fatal. In *May's case* (s) the defendant was indicted for perjury, alleged to have been committed on the trial of an indictment for an assault. The indictment for the assault charged, that the prosecutor had received an injury "whereby his life was greatly *despaired of*." The indictment for perjury introduced the indictment for the assault in these words: "which indictment was presented in manner and form following, that is to say," and then set forth the indictment at length, with the exception of the word *despaired*. But it was holden, (t) that though the word "*tenor*" had so strict and technical a meaning as to render a literal recital necessary, yet that under the words "in manner and form following, that is to say," nothing more than a substantial recital was necessary.

In the case of the *King v. Lookup* (u), the indictment (for perjury) stated the bill in Chancery to be directed to Robert Lord Henley, &c. in fact, it was directed to Sir Robert Henley, knight, &c.; but the objection was overruled.

In the case of *Hendray v. Spencer* (x), for permitting a defendant who had been arrested under a latitat, to escape, the declaration stated a latitat against Donner and J. Doe; the writ produced in evidence was against Donner and two others, and not against Donner and J. Doe, but Lord Mansfield overruled the objection (y).

(s) *Leach*, 227.

(t) By Mr. J. Buller.

(u) Cited in *R. v. Pippett*, 1 T. R. 240.

(x) Cited in the same case.

(y) See also *R. v. Pippett*, 1 T. R. 235. *Cuming v. Sibley*, cited 1 T. R. 239. and *Shuttleworth v. Pilkington*, 1 T. R. 240.

But if a material descriptive allegation be contradicted by the record produced to prove that allegation, the variance will be fatal.

Thus where judgment is alleged to have been given in such a term, *as appears by the record thereof*, &c. if in fact it appear from the record, that judgment was given in a different term, the variance would be fatal (x).

In an action for a malicious prosecution, the declaration alleged the plaintiff's acquittal "on Wednesday next after 15 days, &c. in the court of our said lord the king, before the king himself, at Westminster, before the Lord C. J. assigned to hold pleas before the king himself." From a copy of the roll it appeared, that the plaintiff had been acquitted at *nisi prius*, and the variance was holden to be fatal, since the words of the declaration are descriptive of a trial at bar (a).

An indictment for perjury stated, that the defendant went before a justice of the peace, and swore in substance and to the effect following, that is to say, "that the said S. N. on, &c. at, &c. made an assault upon her the said M. A. T. with an umbrella, and at the same time threatened to shoot her with a pistol;" the information was produced, and ran thus, "and at the same threatened to shoot her," &c. omitting the word *time*, and the variance was holden to be fatal (b).

So in prosecutions for forgery (c), perjury (d), blasphemous or seditious words (e), libels (f), &c. where the indictment is founded upon the very terms and expressions which have been used by the defendant, and which must be set out on the record, any variance affecting the sense will in general be fatal.

(x) 1 H. B. 49.

(c) See p. 93.

(a) Woodford v. Ashley, 2

(d) P. 109.

Camp. 193.

(e) P. 113.

(b) R. v. Mary Ann Taylor,

(f) P. 113.

1 Camp. 495.



## CHAP. XV.

*Of Amendments.*

BY the express provision of the statutes of amendment, cases of treason and felony are exempted from their operation; and it has frequently been laid down, that the exception virtually extends to all criminal prosecutions, and that the proceedings in such cases are amendable according to the rules and practice of the common law only (a).

With respect to an indictment, since it is found upon the oath of a jury, there would be a manifest impropriety in making any alteration in it (b), which could possibly affect the sense, without their consent. Amendments of this kind have, in some cases, been made by the authority of the court even after verdict, but such instances are rare (c). In the second volume of Bulstrode's reports, Mr. J. Yelverton cites the case of two persons, who had been indicted before him for a capital felony: it appeared, that the indictment charged them in the singular number; on that account he staid the proceedings, and took the opinion of the judges; eight or nine of

(a) Burr. 2527. 6 Mod. 268. 1 Sid. 244. 1 Keb. 252. 1 Haw. c. 25. s. 97. 1 Salk. 51, 42. But qu. and see p. 253.  
 (b) Per Ld. Mansfield, Burr. 2569.  
 (c) 2 Buls. 35. and see 11 H. 6. f. 2. and f. 14. where a writ of forger of false deeds was amended by inserting *imaginavit* for *imaginatus est*.

whom (all who were present) clearly held, that the indictment was *good* and amendable; and he adds, that it was amended accordingly, and that both the defendants were executed (*d*).

Where an indictment appeared to be insufficient, either for its uncertainty, or for want of proper legal words, it was anciently the practice to award process to the grand jury, if the court sat in the same county, to come into court to amend it (*e*). And it is the common practice at present to amend indictments in matters of form, whilst the grand jury are before the court; for which purpose they formally give their consent, that the court shall amend matters of form altering no matter of substance.

And it seems, that a rule may be made upon (*f*) the coroner, to amend the body of his inquest by his notes in mere matters of form, and before it is filed,

But the same objection does not apply to other parts of the record extrinsic of the indictment itself; and it seems, that evident misprisions in mere matters of form, either in the joining of issue or setting out the process, are amendable at common law. In Harris's (*g*) case, the defendant having been found guilty of a nuisance, the record was removed into the Court of King's Bench by *certiorari*; and on examination it appeared, that no issue had been joined by the clerk of assize to the plea of not guilty; and though several years had elapsed, and Richard Warer, the clerk of assize, who ought to have entered the *similiter*, had died in the interval, the court or-

(*d*) See Mr. J. Powell's observation upon this case, 6 B. Ind. 12. 2 Haw. c. 25. s. 98.

Mod. 283.

(*f*) 2 Haw. c. 25. s. 97.

(*e*) 22 Ass. 73. 2 E. 3. 1.

(*g*) Cro. J. 502.

dered the words, *et Ricardus Warer, qui pro domina rege sequitur similiter*; &c. to be interlined. In an information *(h)* against the husband and wife for the recusancy of the wife, the appearance of both was recorded upon the roll with the plea of not guilty by the wife *alone*, upon which issue was joined. It was objected, that no issue was joined, for the plea of a feme covert was void; and that, though it appeared from the docket, that both had pleaded, yet the roll being made up of a different term, could not be guided by the docket; but the court held that it was but the misprision of the clerk, and might therefore be amended.

So where a venire, directed *vicecomitibus* of Canterbury, was returned by J. S. *vicecomes*, it was holden that it might be amended on the affidavit of J. S. that there was no sheriff of the place but himself *(i)*.

So in the case of the *King v. Hayes*, where the defendant was indicted for the forging a bond, upon the trial it appeared, that there was a variance between the *nisi prius* roll and the forged instrument upon which a special verdict was found; The prosecutor then moved, that the *nisi prius* roll might be amended by the record of the indictment which was right; and the court inclined to think, that this was amendable at common law, *since there was something to amend by (k)*.

But it seems to be perfectly settled, that a discontinuance is not amendable in any criminal prosecution; and

*(h)* Cro. J. 529. *Parker v.* directed the amendment on another ground. *Ld. Ray.* 1518.

*(i)* 1 Sid. 244. *Keb.* 900. See also 1 Lev. 189. 3 Mod. 901. 8 Coke, 310. 3 Lev. 430. 167. Cro. Car. 144. *Palmer,*

*(k)* Str. 842. But the court 480.

in *Tutshin's case* (d), it was holden by Ld. Holt, C. J. and by Powell, J. that the issuing a *distringas corpora juratorum* tested on the 24th, the *venire facias* being returnable on the 23d, was a discontinuance, and that such a fault, even in a civil case, would not have been cured by the statute 8 H. 6, c. 10.

At common-law the court may amend their own misprision, or even their own judgment, or any other part of the record in the same term, for *during the term*, the record is in the breast of the judges (m).

Where an indictment has been removed into the Court of King's Bench from an inferior court, the general rule seems to have been, that the record might be amended according to the truth, if by the aid of any existing document it could be so amended. Thus the body of an indictment from London may be amended; because, by the city charter, the tenor, i. e. a copy only can be removed from thence, and the original remains a certain guide for the amendment (n).

So it has always been the common course to direct the caption of an indictment to be amended by the clerk of the assizes, so as to make it agree with the original record (o). But with respect to amendments of this nature, a question of considerable difficulty has arisen as to the time of making such an amendment; for, according to the technical distinction, a record cannot be amended in a term subsequent to that in which it be-

(d) 6 Mod. 269. See Yel. 64. (m) *Blackmore's case*, 8 Dyer, 346. 1 Ld. Ray. 1061. 3 Co. 310.

Mod. 335. 3 Bl. Comm. 406. (n) 2 H. w. c. 25. s. 97.

Comb. 73. (o) 1b.

came a record (n); and in conformity with this maxim, the courts have frequently refused to amend the caption of an indictment in a term subsequent to that in which it came in and was entered of record (o).

But, in the case of the *King v. Christopher Atkinson*, it was solemnly decided, after a full consideration of all the previous cases, that a caption might be amended *after the term*, and made to correspond with the truth of the case. It appeared, that the defendant had been convicted at a session of oyer and terminer for the county of Middlesex, that the sessions of the peace *and* of oyer and terminer for the county, are holden at the same time, and that the clerk of the peace had two printed forms of captions, the one applicable to indictments preferred under the commission of oyer and terminer, the other to those preferred under the commission of the peace, and that a junior clerk, upon the receipt of the *certiorari*, took by mistake a return of a caption of the peace, and, striking out the word *peace*, inserted the words *oyer and terminer*. The consequence was, that the caption was neither applicable to a session of the peace, nor to a session of oyer and terminer. The *certiorari* was returned in Easter term, 1783; the defendant was found guilty at the sittings after the next Trinity term, and in the Easter term following, the attorney-general moved to amend the return to the *certiorari*, by the commission, &c. according to the fact, and to amend the caption by the return.

(n) 1 Saund. 249. 2 Haw. 8 Co. 310. 2 Ld. Ray. 968. 6 c. 25. s. 97. Mod. 58. 1 Vent. 344. 2 Ld.

(o) See 2 Hale, 168. Sir W. Ray. 1039. 1 Str. 442. 1 Bac, Jones, 421. 1 Roll. Ab. 196. Ab. 89.

1 Sid. 175. 6 Mod. 273. 278.

This was opposed on the authority of the cases which have been alluded to, in answer to which the following authorities and cases were cited *R. v. Percival* (*p*), *Oddington v. Darby* (*q*), *R. v. Wilkes* (*r*), *Sir W. Blackstone's Commentaries* (*s*), *R. v. Hockenhull* (*t*), *R. v. Hayes* (*u*), *Harris's case* (*x*), *Philips v. Smith* (*y*), *Thorney's case* (*z*), *R. v. Fairweather* (*a*), and *R. v. Ponsonby* (*b*).

Lord Mansfield afterwards delivered the judgment of the court in favour of the amendment, principally on the following grounds (*c*).

1. That the return of a caption to the court of King's Bench is merely a *ministerial* act (*d*), and that ministerial acts are amendable at common law at *any time* (*e*).

2. That the application was to make the *copy* the same as the *original*, and *not to alter* the original caption (*f*).

3. That the cases of the *King v. Hockenhull* and the *King v. Fairweather*, were authorities directly in point (*g*).

(*p*) 1 Sid. 244.

(*q*) 2 Buls. 35.

(*r*) 4 Burr. 2527.

(*s*) 3 Bl. Comm. 406.

(*t*) 3 Mod. 167. Comb. 73.

(*u*) 2 Ld. Ray. 1518. 2 Str.

843.

(*x*) Cro. J. 502.

(*y*) 1 Str. 138.

(*z*) Cro. J. 276.

(*a*) 1 Will. Saund. 249. n. 1.

(*b*) *Ib.* See also 39 H. 6. 40.

(*c*) See the reasons at length,

1 Will. Saund. 248. n. 1.

(*d*) See 1 Saund. 249. and

*R. v. Hockenhull*, 3 Mod. 167.

(*e*) See 1 Str. 136.

(*f*) According to the authorities, *R. v. Hayes*, Str. 843.

*R. v. Alcock*, 1 Sid. 155.

(*g*) The former of these was the case of an *information*, originally filed in the King's Bench, where the clerk of the crown office, in making up the memorandum, inserted *Martini* for *Hilarii*, and, after conviction, the court ordered the mis-

And Lord Mansfield further observed, that "even considering the caption as an original, it may be amended in analogy to the instances of amendment in civil cases at common law which have been allowed; though in fiction of law the original has been already removed; since at common law there is no distinction as to amendments between civil and criminal cases (*h*); and in civil cases there are innumerable instances in which amendments have been made by the record below. So coroners return original inquisitions, yet they may be amended in all points except the finding of the jury (*i*).

prison to be amended. 3 Mod. 167. 1 Will. Saund. 249. n. 1. In the case of the King v. Fairweather, 1 Will. Saund. 249. n. 1. it appears that the court ordered the caption to be amended in a subsequent term; but Mr. Serjeant Williams doubted whether this case could be considered as an authority, since the court made a rule absolute, in the first instance, for the defendant to withdraw his demurrer and plead *de novo*, and that the clerk of the peace should be at liberty to amend the caption, and pay the defendant his costs; and it is impossible to suppose that the court would have made such a rule absolute in the first instance, except by consent.

(*h*). Cro. J. 592. 276. 529. 2 Roll. Rep. 59.

(*i*) In Glover's case, 1 Sid. 259. the inquest found, that Glover, *seipsum felonice submersus fuit*, without saying that he died. It was holden, that this was matter of form and amendable; and Twisden J. held, that an inquisition might be amended by the insertion of the word *murder*, and it was holden, that all matters of form were amendable by the coroner, but no matter of substance. See the form of awarding process to the coroner to come in and amend the inquisition. 8 H. 6. 8. 2 E. 3. 1. 18. See also R. v. Harrison, 1 Sid. 225..

“And in the case of the King v. Wheatley (*k*), the clerk of the peace for the county of Wilts. was ordered to bring into court the original indictment against the defendant, in order that the defendant might be discharged, if upon examination it should agree with the indictment remaining in court, on account of its insufficiency. In the case of the King v. Serjeant (*l*) and others, the clerk of the assize for the county of Lincoln, was ordered to bring into court the whole bag or file of indictments found at the gaol delivery, together with the names of the jurors. And in the case of the King v. Beach (*m*), the clerk of the assizes for the county of Dorset was ordered to amend the *certificate* of the indictment against the defendant, according to the original. The *certificate* must mean either the caption, or the transcript of the indictment itself, and these authorities combat what is said in the case of the King v. Alcock (*n*). These cases shew, that previous to Charles the Second, as well as since, courts have proceeded on the same idea as a fundamental rule, that a fiction of law shall never prevail against the truth of a fact to defeat the ends of justice (*o*).”

Upon the authority of these cases it would probably be holden, that the caption of an inquisition before a coroner, or even the inquisition itself, is amendable in

(*k*) Mich. 3 J. 1.

(*l*) Hil. 3 J. 1.

(*m*) Mich. 7 J. 1. contra 1 Roll. Ab. 196. where the clerk of assize, certifying the record, omitted a continuance; and the court would not allow it to be amended. See 4 Mod. 396.

(*n*) 1 Sid. 155.

(*o*) See 1 Sid. 225. 259. Cro. Eliz. 258. Fitz. Amend. 35.

Br. Amend. 80. 13 H. 7. 23. 11 H. 7. 21. Br. Amend. 80.

In the case 44 E. 3. 6. the court ordered an *ex assensu partium* to be entered on the roll in a subsequent term. But see Br. Amend. 21.



matter of form after it has been filed, either in the same or in a *subsequent term*, though, according to Serjeant Hawkins (o), it has been holden, that the caption of an inquisition cannot be amended at any time after it has been filed, any more than the body.

With respect to criminal *informations*, it seems to be settled, that they, and the pleadings founded upon them, are amendable upon motion in court, or even before a judge at chambers, at *any time before the trial*, in matters of substance as well as of form, though if the alteration be material, leave is given to the defendant to alter his plea (p); for these differ most materially from indictments and inquisitions, inasmuch as they are prepared by an officer of the court, and not upon oath after an examination of witnesses.

And even after judgment the court will amend a mere clerical misprision, which does not occur in the body of the information. Thus where the clerk entitled the memorandum as of *Michaelmas* instead of *Hilary term*, the court held that the defect was amendable (q); and intimated that the defect was amendable by virtue of the stat. 8 H. 6. c. 12. which specially excepts appeals and indictments of *treason and felony* and outlawries for the same. This special exception following words in the statute of the most general and comprehensive nature, including "any record, process, word, plea, warrant of attorney, writ, parcel, or return, which for the time shall be," ap-

(o) 2 Haw. c. 25. s. 97. But Ann. cited. Str. 871. 1 Lev. see the cases, p. 251, n. (o). 189. R. v. Goffe. R. v. Hol-

(p) R. v. Harris, 1 Salk. 47. land, 4 T. R. 457.

50. Str. 871. R. v. Charles- (q) R. v. Hockenhull, 3 worth. R. v. Wilkes, Burr. Mod. 167.

2568. R. v. Simmonds, 10

pears so strongly to indicate an intention on the part of the legislature, that the statute should extend to indictments for misdemeanors below the degree of felony, as at least to justify a slight degree of scepticism in respect of a contrary construction, and to warrant a brief inquiry into the authorities upon which that construction is founded. In the first place, Lord Coke, in *Blackamore's case*, in enumerating fourteen misprisions, which he says are not amendable by virtue of the stat. 8 H. 6. c. 12. asserts, that it does not extend to an appeal, nor to *pleas of the crown, for they are excepted*; which is a remarkable assertion, for the words of the statute give the judges power to amend "all that which to them seemeth to be misprision of the clerks in *any record, process, word, plea, warrant of attorney, writ, pannel, and return, except appeals, indictments of treason and felony, and outlawries for the same.*"

In Tutchin's (s) case, Mr. J. Powys expressed a direct opinion that the statute in question extended to crown cases which were not within the exceptions of the statute, since the purview of the statute is as express and general as it can be, and the exception but particular; and he added, that in Lord Bridgwater's case, Lord Hale thought the statute was not to be so restrained; but Powell, J. was of opinion, that the statute 8 H. 6. c. 12. was to be explained by the previous statute of amendment, 14 E. 3. c. 6. and that the exception in the statute of Henry was introduced *ex abundanti cautela*.

In the case of the *King v. Hockenhull* (t), the court, as has already been observed, held that the statute did not extend to criminal cases which were not excepted. Lord Hale (u), in his *Pleas of the Crown*, says, that none

(s) *Ld. Ray.* 1861. *Salk.* 51.

(t) 3 *Mod.* 167.

(u) 2 *Hale*, 193.

of the statutes of jeofails apply to indictments; but this must be understood as said in reference to the indictments of which he was then treating; namely, to indictments in capital cases, since in entering upon the subject he cautiously admonishes the reader that he intends to treat of those indictments only which relate to *capital offences* (x). Serjeant Hawkins lays it down as a settled rule, that no criminal prosecution is within any of the statutes of amendments, for which he cites Tutchin's (y) case and Reed's (z) case; but in the latter of those cases the defect was holden to be amendable at common law, in the former it was holden that the fault was incurable even by the statutes, supposing them to apply.

In Wilkes's (a) case, Lord C. J. Mansfield and Mr. J. Yates seem to have been of opinion, that the statutes of amendment did not apply to criminal cases; but it is to be observed, that there was no necessity in that instance to resort to the statute, for the amendment was clearly warranted by the established practice and usage of the court, and the question was, as to the alteration of a very material allegation in the information, to which the statute could have no relation whatever. Finally, notwithstanding the frequent acquiescence which has been yielded from time, by very eminent judges, to the broad position of Lord Coke, it is impossible to forget that this was founded either upon a misrepresentation of the statute itself, or upon a forced extension of its plain and literal sense; and it must be confessed that his opinion has been adopted without much investigation or argument, though not wholly without opposition. The courts have, in many instances, shewn a desire of avoiding the question, by making amendments as at common law, rather than avowedly under the statute, and no case appears in

(x) 2 Hale, 165. c.

(z) 1 Sid. 66.

(y) 6 Mod. 268.

(a) 4 Burr. 2568.

which an amendment which was allowable under the statute, but not at common law, has been applied for; and, therefore, there does not seem to be any express decision that the statute is inapplicable to criminal cases below the degree of felony. On the contrary, Hocken-hull's case is a direct authority on the other side.

With respect to amending *pleas*, &c. at the instance of the defendant, it was holden, in Knowles's case, that his plea to an indictment for murder might be amended after it had been filed and after the attorney-general had replied, and the court held, that, before judgment, and whilst things were in *fieri* and agitation, they had authority over all the proceedings (b).

It has been said, that a verdict general or special cannot be amended by the notes of the clerk of assize in criminal, though it is otherwise in civil cases (c).

But in the case of Eddowes v. Hopkins (d), *Ld. Mansfield* mentioned the case of one Gibson who was convicted of robbery, and a mistake being discovered in the verdict, it was, on consultation with all the judges, corrected from the minutes signed by the jury, and the prisoner was executed. And the same was holden by Lord Mansfield in Hazell's case, upon a special verdict on an indictment for murder (e).

With respect to the judgment, the recording of it is an act so important in its nature, and is presumed to have been done with such deliberation and attention, that it cannot be altered either by the same court or by any other after it has become matter of record. In Walcott's case (f) the judgment for treason was thus entered

(b) 1 Salk. 47. Holt, 530.

(c) Leach, 425. Buller J.

(c) R. v. Keat, Salk. 47.

dissent. See *Ld. Ray*. 141.

Bold's case, Salk. 53. Keil. 1.

(f) 4 Mod. 395. The rever-

(d) Doug. 375.

sal was afterwards confirmed in the House of Lords.

—“ *quod interiora sua extra ventrem suum capiantur,*” omitting the words, “ *ipso que vivo comburantur.*” Upon writ of error brought by his son, those who claimed the father’s estate, under the king’s grant, moved that the clerk of the indictments for London might attend, which he did, and produced the record of Walcott’s attainder in court, and also the indictment on which he was tried, and it appeared, upon inspection, that the deficient words were amongst the minutes taken by him, and indorsed upon the indictment. It was then moved, that the record might be amended by the minutes, but the court refused the application, and the judgment was reversed for this defect.

## CHAP. XVI.

*Of Process upon Indictments and Informations.*

- I. *In case of Treason or Felony, p. 257.*
  - 1. *Of the Capias, and in what Cases more than one is requisite, p. 257.*
  - 2. *Of the Exigent and Outlawry, p. 267.*
  - 3. *Writ of Proclamations, p. 270.*
- II. *In Case of Misdemeanors below the Degree of Felony, p. 272.*
- III. *In Case of Informations, &c. p. 275.*
- IV. *Defects in Process, p. 276.*

AFTER an indictment has been found against a defendant, if he be not in custody, it is necessary to issue process for the purpose of bringing him into court to defend himself against the charge; for though a bill may be preferred and found against a person in his absence, this being merely an *ex parte* proceeding to which, if present, he could make no opposition, yet no indictment can be tried unless he personally appear; a provision founded upon a principle of equity in all cases, and the express enactment of the stat. 28 E. 3. c. 3. in capital ones, that no man shall be put to death without being brought to answer by due process of law (a).

After the indictment, in the usual order of the record, follows the *award* of process, whose different stages will next be briefly considered.

The first step in process upon indictments for treason

(a) 4 Comm. 318.

or felony is a *capias* (b), by which the sheriff is commanded, that he omit not, on account of any liberty, &c. to take the defendant if he be found within his bailiwick, and to produce his body before the court, on a day named, in order to answer the charge.

If this writ issue from the King's Bench, it should be tested by the chief justice (c), or, during a vacancy, by the senior judge; if it issue from any other superior court, it should be tested by the first of those named in the commission (d); and if the indictment be taken before justices of the peace at sessions, though the process must be awarded by two at the least, the *capias*, it seems, may be tested by one (e).

In all cases, the writ must be in the name of the king (f), though, if it issue within a county palatine or liberty, it must be tested in the name of the owner of such county palatine or liberty.

This writ may be issued by the Court of King's Bench upon any indictment originally found there, or removed thither, directed to the sheriff of the county where the party is indicted; and upon a *non inventus* returned, and a *testatum* that he is in another county, the court may award the *testatum capias* into any other such county (g).

Justices of gaol delivery cannot issue a *capias*, for their commission extends only to the delivery of the gaol (h); but justices of oyer and terminer may issue the *capias*, and proceed to outlawry upon it; and so may justices of the peace (i).

(b) 3 Mod. 265. 2 Hale, 194.

2 Haw. c. 27. s. 15.

(c) 2 Haw. c. 27. s. 8. 2  
Hale, 199.

(d) 2 Haw. c. 27. s. 8.

(e) Ib.

(f) 27 H. 8. c. 24. s. 3.

(g) 2 Hale, 198.

(h) Ib.

(i) 5 E. 3. c. 11. 1 E. 4. c. 1.

And Lord Hale was of opinion, that a coroner might make process of outlawry (*k*).

Justices of the peace in sessions are empowered by their commission to make and continue processes against persons indicted, until they can be taken, surrender themselves, or be outlawed; and the same authority is vested in them by the stat. 5 E. 3. c. 11. and 1 E. 4. c. 2.

Where the process is awarded from the King's Bench into any other county, there should be an interval of 15 days at least between the teste and return of every process; but where the process is awarded into the same county where the court sits, this is not necessary (*l*). Where it is awarded by the justices of oyer and terminer and general gaol delivery, it is made returnable at the next session of oyer and terminer and gaol delivery.

The writ is directed to the sheriff, &c. of the county or division for which the court sits, before which the indictment was taken; but if the defendant dwell in another county, process may be directed thither by virtue of the statute 5 E. 3. c. 11. which recites, that divers persons, *appealed* or indicted of divers felonies in one county, or outlawed in the same county, had been dwelling or received in another county, whereby such felonious persons, indicted and outlawed, had been encouraged in their mischief, because they might not be attached in another county; and *enacts*, "That justices, assigned to hear and determine such felonies, shall direct their writs to all the counties of England, when need shall be to take such persons indicted." Since an *appeal* could not be taken before justices of the peace, it has been doubted, (*m*) whether *they* were within the meaning of this statute, but they certainly are within the express words of

(*k*) 2 Hale, 199. 27 Ass. 47.      (*m*) 2 Haw. c. 27. s. 3.

(*l*) 2 Haw. c. 27. s. 16.



it; and the intention of the legislature would be in part frustrated by an exclusive construction. Independently of this statute, process by writ might be well awarded into any county of England, either by the King's Bench or by justices of eyre, &c. upon an indictment before them.

A *capias* may issue against a peer of the realm, in case of treason, felony, or breach of the peace (o).

The sheriff either brings the party into court upon the return of the *capias*, or returns *non est inventus*.

Upon the latter return, in cases of treason and homicide (p), the writ of *exigent* issues immediately; but, in indictments for any felonies but homicide, it appears to be doubtful, whether a second *capias* was not formerly requisite previous to the *exigent* (q); Lord Hale, however, expressly says, that the process in his time, in case of any felony, was one *capias* and then an *exigent* (r). But to this rule there are some exceptions (s).

1. In favour of those who are charged as accessories either before or after the fact; for, since their guilt is purely derivative, it is an incontrovertible rule, that no accessory can be convicted before the conviction of his principal, and as an outlawry in felony is equivalent to a conviction, it follows, that process of outlawry ought not to issue against the accessory previous to the outlawry of the principal.

2dly. In case of indictments of felony before justices in their sessions.

3dly. In favour of those whose residence in another

(o) 2 Hale, 199. Cro. Eliz.

(r) 2 Hale, 195.

503.

(s) An *alias* and *pluries* were

(p) 2 Haw. c. 27. s. 112.

not unfrequent at common law.

(q) F. Cor. 184. 234. F.

See Trem. 280.

Exig. 3. 2 Haw. c. 27. s. 112.

2 Hale, 194.

county renders further process necessary, according to the provision of several statutes.

1. In favour of accessories, the stat. 1. West. (*t*) recites, that it had been used in some counties to outlaw persons, being appealed of commandment, force, aid, or receipt, within the same time that he which is appealed for the deed is outlawed; and enacts, that none be outlawed upon such appeal, unless he that is appealed of the deed be attainted, so that one like law be used therein throughout the realm; and directs further, that their *exigent* shall remain, until such as be appealed of the deed be attainted by outlawry or otherwise.

This statute, it has been holden, extends to indictments as well as to appeals (*u*); for the reason of the rule comprehends both. They were both upon the same footing at common law (*x*), and the act itself, from its terms, appears to have been intended to remedy an abuse, which *partially* prevailed, and not to alter the practice at common law.

Where, then, one is charged in an indictment as the principal, and another as accessory, the process by *capias* is against all, but the *exigent* issues against the principal only; and the process should be continued, by *capias infinite*, against the accessory till the principal be outlawed, and then an *exigent* should issue against the accessory, because then the principal is attaint by the outlawry; and if the accessory appear upon the *capias*, he should be admitted to bail, and have the same day given by bail, till the process be determined against the principal (*y*).

(*t*) 3 E. 1. c. 14.

Brac. 127. Britt. f. 5. & Ins.

(*u*) Summ. 210. 2 Hale, 200. 183.

3 Ins. 183.

(*y*) 2 Ins. 183. St. 1 West.

(*x*) 2 Haw. c. 27. s. 129. c. 14. Staundf. c. 17. f. 69. 2 Hale, 200.

If A. and B. be indicted as principals in the felony, and C. as accessory to both, it seems the *exigent* shall stay till both be attainted; but he may be convicted upon an indictment, though it appear that he was accessory to one only, yet it seems to be otherwise in case of appeals (a).

And if several be appealed, and some appear and plead in abatement of the whole writ, or in bar of the whole proceeding, the suit shall be continued against the defaulters by *capias* only, and no *exigent* shall be awarded till such plea be determined (b).

If the *exigent* issue against both principal and accessory, who are charged as such, the writ will be good as against the former, though not as against the latter (c); and should an outlawry be pronounced against the accessory, in such case he may traverse it, for its illegality is apparent upon the record (d). But upon an appeal, where the writ is general, and does not distinguish between principal and accessory, it is difficult to say how the accessory is to take advantage of the statute (e).

But if the appellor take out the *exigent* against all as principals, he is estopped from counting against any of them as accessories, according to the opinions of Staundforde, Lord Coke (f), and Lord Hale (g); this, indeed, has since been doubted by Serjeant Hawkins, on the ground that the defect consists in process only, and therefore is cured by appearance.

But it is to be observed, that here the defect does not

(a) 9 Co. 119. 2 Hale, 200, (d) 2 Haw. c. 27. s. 130. 43  
201. 2 Ins. 183. 2 Haw. c. 27. E. 3. 17, 18. 34.

s. 132. (e) 2 Haw. c. 27. s. 130.

(b) Sum. 210. 2 Haw. c. 27. (f) 2 Ins. 183.

s. 118. (g) 2 Hale, 200. see 7 H. 4.

(c) 4 T. R. 521. 2 Haw. 27. F. Cor. 80. 40 Ass. 25.  
c. 27. s. 131. 8 H. 5, 6.

rest merely in process, but causes upon the record a material variance between the process and count as to the subject matter of the charge and the character in which the defendant is accused; since it appears by the original writ, *capias*, and *exigent*, that he is charged as a principal, and by the *count* that he is charged as an accessory only; and a variance of this nature, it is well known, was formerly fatal upon oyer and demurrer, even in civil proceedings.

2dly. By the stat. 25 E. 3. st. 5. c. 14. after a man is indicted of *felony* before justices to hear and determine in their sessions, it shall be commanded to the sheriff to attach his body by writ or precept of *capias*; and if the sheriff return that his body is not found, *another capias* shall incontinently be made, returnable at three weeks after; and in it shall be comprized, that the sheriff caused to be seized his chattels, and keep them till the return; and if the sheriff return that the body is not found, and the indictess cometh not, the exigend shall be awarded, and the chattels forfeit, as the law of the crown ordaineth; but if he come and yield himself, or be taken by the sheriff, or other minister, before the return of the second *capias*, then the goods and chattels shall be saved.

This statute does not extend to treason, and therefore, upon an indictment for that offence, the *exigent* must issue upon the return of *non inventus* to the first *capias* (g).

Neither does it extend to a court of oyer and terminer and general gaol delivery, but only to proceedings before justices at their general or quarter sessions. For the statute is in terms thus confined, and its provisions are wholly incompatible with a court of assizes and oyer and terminer, which never sits from three weeks to three weeks (h).

(g) 2 Hale, 194.

(h) R. v. Yandell and others,  
4 T. R. 538. 2 Hale, 195.

Although the statute directs, that in the *alias capias* the sheriff shall be commanded to take the goods, yet this, it has been holden, is not essential to the validity of the *capias* itself (*i*).

3dly. By the common law, an *exigent* was never awarded to the sheriff of any county, but that in which the offence was laid (*k*), and no other *capias* was necessary.

This opened the door to a very vexatious practice: indictments were preferred in the *King's Bench*, charging persons with treason or felony committed in the county where the court sate, upon which a *capias* was awarded, returnable after an interval of two or four days, and then an *exigent* issued, whereby the goods and chattels of the party indicted became forfeited to the king. The statute 6 H. 6. c. 1. reciting this grievance, enacted, that before any *exigent* be awarded against any person indicted in the *King's Bench of treason or felony*, a writ of *capias* should be directed to the sheriff of the county of which the party was named in the indictment, as well as a *capias* to the sheriff of the county wherein the party was indicted; and that such *capias* should have the space of six weeks at the least or longer, at the discretion of the justices, before the return; and that upon the writs so returned, the justices should proceed in the manner they had done before the statute; and that any *exigent* awarded, or outlawry pronounced, before the return of the same, should be void.

This statute, it is observable, applies only to indictments in the *King's Bench* of treason or felony.

The stat. 8 H. 6. c. 10. (*l*) recites, that many persons

(*i*) R. v. Yandell, 4 T. R.  
537. R. v. Morley, Trem, 280.  
3 Keb. 125,

(*k*) 2 Haw. c. 27. s. 119.  
(*l*) Does not extend to Ches-  
ter by 8 H. 6. c. 10. s. 6.

had been maliciously indicted and appealed of *treason*, *felony*, or *trespass*, in foreign counties, and by force of such indictments had been put in *exigent*, whereby their goods had been forfeited, and their lives placed in jeopardy; and for remedy thereof, enacts, that upon every indictment or appeal, by which any of the said lieges dwelling in other counties than those where such indictment shall be taken, to be taken hereafter before the justices of peace, or before any other having power to take such indictments or appeals, &c. before any *exigent* awarded upon any indictment or appeal in the form aforesaid to be taken, that presently after the first writ of *capias* upon such indictment or appeal awarded and returned, another writ of *capias* be awarded, directed to the sheriff of the county, whereof he which is so indicted is or was supposed to be conversant by the same indictment, returnable before the same justices or commissioners before whom he is indicted or appealed, at a certain day, containing the space of *three months* from the date of the said last writ, where the counties be holden from month to month, and where the counties be holden from six weeks to six weeks, he shall have the space of four months until the day of the return of the same writ. By which writ of second *capias*, be it contained and commanded to the said sheriff, to take him which is so indicted or appealed by his body, if he can be found within his bailiwick; and if he cannot be found within his bailiwick, that the said sheriff shall make *proclamation* in two counties before the return of the same writ, that he, which is so indicted or appealed, shall appear before the said justices or commissioners, in the county, liberty, or franchise, where he is indicted or appealed, at the day contained in the said last writ of *capias*, to answer, &c.; after which second writ of *capias*, so served

and *returned*, if he, which is so indicted or appealed, come not at the day of the said writ of *capias* returned, the *exigent* shall be awarded, &c.

By the stat. 8 H. 6. c. 10. s. 6. if any person be indicted of felony or treason, and, at the time of the felony or treason supposed, was conversant within the county whereof the indictment or appeal makes mention, the like process shall be used against such person as was used before.

The stat. 10 H. 6. c. 6. recites, that indictments and appeals, before justices and others, had been removed into the King's Bench and elsewhere, by *certiorari* or otherwise, unknown to the party so indicted or appealed, and thereupon was sued the common law process; and then directs, that the same process be used upon indictments removed by *certiorari* into the King's Bench, or into any other court.

Indictments of felony or treason, originally taken in the King's Bench, are not (it has been holden) within the statute 8 H. 6. c. 10. (z); but by the stat. 6 H. 6. c. 1. a *special* provision is made, that before any *exigent* awarded, the court shall issue a *capias* to the sheriff of the county where the indictment is taken, and *another* to the sheriff of that county whereof he (the defendant) is named in the indictment, having six weeks time or more before the return; and after these writs the *exigent* shall issue as before.

But since the party must have been conversant in the county where the offence was committed, he may be named of the place where the fact was committed in the indictment, and then the process is to go as at common law before these statutes; and where the felony is com-

(z) Qu. and see 2 Haw. c. 25. s. 124. but see 1 E. 4. l. 19 H. 6. 2. Summ. 209. F. Process, 103.

mitted at A. in the county of B. the usual course is to allege, that J. S. late of A. in the county of B. &c. (a).

And if the indictment allege, that J. S. late of A. in the county of B. *aliàs* J. S. late of C. in the county of D. &c. no process shall go to the sheriff of the county of D. for the addition under the *aliàs* is neither material nor traversable (b). So, if the description be J. S. of A. in the county of B. late of C. in the county of D. the *capias* shall not issue to D. because the indictment supposes him to be conversant in B. when it was taken. But if the description be J. S. late of A. in the county of B. late of C. in the county of D. upon the return of a *capias* in the county of B. a *capias* with proclamations shall issue to the sheriff of D. by virtue of these statutes (c).

If the defendant be named of a county palatine, a *capias* must be awarded thither by virtue of the statutes (d), and it should be directed to and returned by the chancellor, &c. of such county (e), in case the chancellor omit to return it, it is said the *exigent* may be awarded without a return; but the statutes give no power of issuing the *exigent* until after the return, and the proper course in such case seems to be by motion to the King's Bench to enforce the return of writ (f).

Notwithstanding the provision contained in these statutes, that an outlawry pronounced contrary to their direction shall be utterly void; yet it has in many instances been holden to be merely voidable (g).

*Of the exigent.*

Upon a return of *non est inventus* to the first *capias*, in case of treason or felony at common law, or to the second

(a) 2 Hale, 196.

Chester is excepted out of 8

(b) 2 Hale, 196. 1 E. 4. 1.

H. 6. c. 10.

(c) 30 H. 6. 2 Hale, 196.

(e) 1b. and Rastall, 52.

(d) 2 Haw. c. 27. s. 125. But

(f) See Cro. Car. 252, 253.

(g) 2 Haw. c. 27. s. 127.



or third under the above statutes, the writ of *exigent* is issued, whereby the sheriff is commanded to exact the defendant from county court to county court, until he be outlawed for not appearing, and if he should appear to have his body before the justices, &c. to answer, &c. Upon this the sheriff calls or exacts the defendant at five successive county courts, and if he does not appear he is outlawed by the judgment of the coroner, and thereupon the sheriff returns the whole special matter to the court.

If there were not five county courts between the delivery of the writ to the sheriff and the return-day, and the sheriff returns that the defendant has been exacted twice or oftener, and has not appeared, a special *exigent* is issued allowing the former exactions, and requiring the sheriff to proceed. But it is essential that the demand should be made on five successive county court days, and if there was any interruption, an *exigi facias de novo* becomes necessary.

A return of outlawry upon the *exigent* must be certain in the following particulars :

1st. As to the place of holding the county court, which must appear to be within the county ; and, therefore, it has been holden, in a series of instances, to be insufficient to return *ad comitatum meum tentum apud S. in com. Somers.* without saying *ad comitatum meum Somerset (h).* But it is sufficient for the sheriff to return at my county of S. without saying county court. But if the return state the place where the county court was holden at the first exaction, it is sufficient, in stating the remain-

(h) Wilkes's case, 4 Burr. 2560. Whiting's case, 2 Roll. 4. but see the case of Barrington, 3 T. R. 499. Plum's case, return was amended according Latch. 210.

ing exactions, to allege, that they were made at my court holden at the same place (*i*).

2. The day and year of the king's reign upon which every successive exaction was made (*k*).

And, therefore, *anno regni dominæ reginæ*, without saying *Elizabethæ*, has been holden insufficient.

So the return will be bad if it appear that the interval between two exactions was less than a month (*l*).

So if the *exigent* be against A. and B. and the return is, that they did not appear without adding, nor did either of them (*m*).

3. It has been said, that the name of the coroner must be subscribed to the judgment of outlawry at the *quinto exactus* by the name of his office, except in London, where the mayor is coroner (*n*); but in the case of the *King v. Barrington* (*o*), it was holden to be sufficient, that the names of those by whom the outlawry was pronounced, and that they were coroners, appeared on record.

If the *exigent* be directed to a sheriff consisting of two persons as in the county of Middlesex, it is sufficient to allege in the return, that the defendant was exacted at my county court (*p*).

It need not be expressly stated upon the record, that a writ of *capias* issued against the defendant; it is sufficient to allege, that the sheriff was commanded to take the defendant, &c. (*q*).

Neither is it necessary to aver upon the record, that

(*i*) 4 Burr. 2560.

(*k*) 2 Roll. Ab. 803.

(*l*) 2 Hale, 203.

(*m*) 2 Hale, 204. R. v. 528. 531. 521.

Almon, 5 T. R. 202.

(*n*) 2 Hale, 204. Cro. J. 531.

2 Roll. Ab. 801.

(*o*) 4 T. R. 542. Cro. J.

(*p*) Burr. 2560.

(*q*) R. v. Perry, 6 T. R. 573.

the writ of *capias* or *exigent* was sealed by the justices (r).

In cases of treason and felony, an outlawry thus pronounced amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by his country, and he is considered, for many purposes, as actually dead; but though the law will not permit one who has renounced all claim to its assistance, to derive benefit from any legal proceedings, it will not tolerate any wanton attempt on the life of the person outlawed; and although he was formerly said to have *caput lupinum* at the mercy of every one, it is now holden, that no man is entitled to kill him wantonly or wilfully, but in so doing is guilty of murder (s).

Such is the course of proceeding to outlawry, in cases of treason or felony, at common law. In addition to this,

The stat. 4 & 5 W. & M. c. 22. s. 4. after reciting that it is agreeable to justice that proceedings to outlawries should be as public and notorious in criminal as in civil cases, ENACTS, that upon the issuing of any *exigent* out of any of *their majesty's courts*, against any person or persons for *any criminal matter*, before judgment or conviction, there shall also issue a writ of proclamation bearing the *same teste and return* to the sheriff or sheriffs of the county, city, or town corporate, where the person or persons in the record of the said proceedings, is or are mentioned to be or inhabit, according to the form of the stat. 31 Eliz. c. 3. which writ of proclamation shall be delivered to the sheriff or sheriffs three months before the return of the same.

By the stat. 31 Eliz. c. 3. the sheriff is required to

(r) 4 T. R. 521.

(s) 1 Hale, 497. 4 Bl. Comm. 47.

make three proclamations, one in the open county court, another at the general quarter sessions of the peace in those parts, where the party defendant, at the time of the *exigent* awarded, shall be dwelling, and another one month at least previous to the fifth exaction, at or near the most usual door of the church or chapel of that town or parish where the defendant shall be dwelling at the time of the said *exigent* awarded. And if the defendant shall be dwelling out of any parish, then in such place as aforesaid of the parish, in the same county, and next adjoining to the place of the defendant's dwelling, and upon a Sunday immediately after divine service.

The stat. 4 & 5 W. & M. does not apply to any outlawry after conviction, for the words are *before* judgment or conviction (*t*).

The writ of proclamation, in conformity with the stat. 31 Eliz. c. 3. should command the defendant to render himself to the sheriff on or before the day of exaction, so that he may have his body before the justices on the return (*u*); and if it command him to appear before the justices on the return of the writ, the writ will be erroneous. But it is sufficient, if it appear by the record, that the defendant was required to render himself to the sheriff, so that the sheriff might have his body before the justices, &c. at the return of the writ (*y*).

Where the writ required the sheriff to proclaim the parties in open court in the *sheriff's county*, it was holden to be sufficient, though it did not say *county court* (*z*).

It is not necessary that the sheriff should allege in his return, that the person proclaimed did not render himself, though this is necessary in his return to the *exi-*

(*t*) Burr. 2559. 3 T. R.

(*y*) 4 T. R. 521.

(*u*) 3 T. R. 501.

(*z*) 4 T. R. 521.

*gent* (a); but in his return to the writ of proclamations, he must specially shew how they were made, to enable the court to judge whether they were properly made or not (b).

In Barrington's case it was stated upon the record, that the writ of *capias cum proclamatione* issued on the 20th day of September, in the 27th year, by which the sheriff was commanded to take the defendant, and have his body before the justices, &c. at the general sessions of the peace next after the 1st of February next ensuing, to wit, on Monday, the 28th day of February, in the 28th year, &c. it appeared by the sheriff's return to the *exigent*, that the defendant was a fifth time demanded on the 21st day of February, in the 28th year, and did not appear, wherefore he was outlawed, &c.; so that it appeared, that the defendant had a day in court after his outlawry, and for this the outlawry was reversed upon a writ of error (c).

It need not be expressly alleged upon the record, that the writ was delivered to the sheriff three months before the return of it, provided the fact can be collected from the record (d).

II. Thus far as to process upon indictments for treason and felony.—Next, where an indictment has been found for a crime of an inferior nature, the first step in the process is a *venire facias ad respondendum* (e). On this the defendant is summoned, and if he do not appear, and the sheriff return that he has lands in the county, whereby he may be distrained, a *distringas* is awarded (f), and is

(a) 4 T. R. 521. R. v. Morley, Trem. P. C. Lilley's Ent. 560. Clift. Ent. 394. Thes. Brev. 172. immediately by the justices of oyer and terminer, by the King's Bench, in the same county, and by justices at the sessions by consent. 3 Salk. 371.

(b) 5 Burr. 2559.

(c) 3 T. R. 499.

(d) R. v. Perry, 6 T. R. 573.

(e) 2 Haw. c. 27. s. 9. The *venire* may be made returnable

(f) 2 Haw. c. 27. s. 10. In case of trespass, a *capias* issues upon the return of the *venire*. 2

Hale, 194.

repeated from time to time, whereby he forfeits on every default the issues returned by the sheriff. But if upon the *venire* the sheriff return, that the defendant has nothing whereby he can be distrained, a *capias* issues, and then an *alias*, and then a *pluries* shall issue, and then the *exigent*, upon which the defendant may be outlawed (*f*). But if the prosecutor proceed to outlawry after judgment, one *capias* (*g*) only is necessary. Where a *capias* does not lie, as in proceedings against hundredors, corporators, &c. and against peers, except in cases of treason, or felony, or breach of the peace, the only mode of proceeding is by *venire* (*h*) and *distringas*.

But it was the usual practice before the stat. 48 G. 3. c. 58. for any judge of the court of King's Bench, upon certificate of an indictment found for a misdemeanor, to award a writ of *capias* immediately, in order to bring in the defendant (*i*). And in general, unless it be deemed necessary to pursue the offender to outlawry, a *capias* is issued by the court before which the indictment is found in the first instance. But if the process be continued to outlawry, a greater exactness is necessary, and after the appropriate writs have been issued in regular order, the offender is put in *exigent*, in order to his outlawry.

An outlawry in treason or felony, amounts, as has already been seen, to a conviction and attainder of the offence charged in the indictment, but an outlawry for a misdemeanor, enures only as a conviction of the contempt for not answering, which contempt is punished by the forfeiture of his goods and chattels (*k*), and all the profits of his real estate. This process lies upon criminal

(*f*) 2 Haw. c. 27. s. 10.

(*i*) 4 Bl. Comm. 319.

(*g*) 2 Haw. c. 27. s. 111.

(*k*) R. v. Wilkes, 4 Burr.

(*h*) Tidd's Prac. 110. 4th ed. 2533.

Burn's Jus. tit. Process, 80.

informations for offences at common law, as well as upon indictments and presentments (*l*).

The st. 48 G. 3. c. 58. enacts, that whenever any person shall be charged with any offence for which he or she may be prosecuted by indictment or information in his majesty's court of King's Bench, not being treason or felony, and the same shall be made appear to any judge of the same court by affidavit, or by certificate of an indictment or information being filed against such person in the said court for such offence, it shall and may be lawful for such judge to issue his warrant, under his hand and seal, and thereby to cause such person to be apprehended and brought before him, or some other judge of the same court, or before some of his majesty's justices of the peace, in order to his or her being bound to the king's majesty with two sufficient sureties, in such sum as in the said warrant shall be expressed, with condition to appear in the said court at the time mentioned in such warrant, and to answer all and singular indictments and informations for any such offence; and in case any such person shall neglect or refuse to become bound as aforesaid, it shall be lawful for such judge or justice respectively, to commit such person to the common gaol of the county, city, or place, where the offence shall have been committed, or where he or she shall have been apprehended, there to remain, until he or she shall become bound as aforesaid, or shall be discharged by order of the said court in term time, or of one of the judges of the said court in vacation, and the recognisance to be thereupon taken shall be returned and filed in the said court, and shall continue in force until such person shall have been acquitted of such offence, or, in case of conviction, shall have received judgment for the same, unless sooner ordered by the said court to be discharged.

By stat. 48 G. 3. c. 58. where any person, by virtue of a warrant of commitment under that act, or by virtue of any writ of *capias ad respondendum*, issued out of the said court, shall be committed to and detained in any gaol for want of bail, the prosecutor may cause a copy thereof to be delivered to such person, or to the gaoler, keeper, or turnkey of the gaol, wherein such person is or shall be so detained, with a notice thereon indorsed, that unless such person shall, within eight days from the time of such delivery, cause an appearance, and also a plea or demurrer to be entered in the said court to such indictment or information, an appearance, and the plea of not guilty will be entered thereto in the name of such person. And in case he shall, thereupon, for the said space of eight days after such delivery, neglect to cause, &c. appearance, and also a plea or demurrer to be entered in the said court to such indictment or information, it shall be lawful for the prosecutor, upon an affidavit being made and filed in the said court, of a delivery of a copy of such indictment or information, with such notice indorsed thereon as aforesaid, to such person or to such gaoler, &c. which affidavit may be made before any judge or commissioner, &c. of the said court, to cause an appearance, and the plea of not guilty to be entered in the said court to such indictment or information for such person, and such proceedings shall be had thereupon, as if the defendant in such indictment or information had appeared, and pleaded not guilty, &c. (m).

III. The stat. 21 J. 1. c. 4. directs, that the like process

(m) As to the proceeding, another county within the same where a person indicted in one part, see the stat. 24 G. 2. c. part of the united kingdom 55. 13 G. 3. c. 31. 44 G. 3. escapes into another part, or into c. 92. 45 G. 3. c. 92.



in every information (by a common informer) to be commenced, sued, or prosecuted by force of or according to the said act, be had and awarded to all intents and purposes as in an action of trespass *vi et armis* at the common law; and, therefore, the process must be by attachment and distress infinite, where by the return the party appears to be sufficient, otherwise by *capias* (*m*).

*Process upon default.*

If the defendant appear to an indictment of felony, and before issue joined make his escape, the process against him is by *capias* (*n*) and *exigent*, as before, unless there had before been an *exigent*, and in that case a new *exigent* (*o*) shall be awarded. If the default be after issue joined and an issue awarded to try it, then if he has been brought in upon a *capias*, a *capias ad audiendam juratam* should be awarded (*p*) against him. But where he has appeared upon the *exigent*, and makes default after issue joined, a new *exigent* should be awarded, and if he appear upon the new *exigent*, he should, according to Lord Hale (*q*), plead *de novo*; for, by the *exigent*, it seems both the issue and inquest are without day, but Serjeant Hawkins (*r*) is of opinion, that though the inquest is put without day by the *exigent*, it is not waived, and that the court may cause the same inquest to try the same issue, unless the defendant fail to render himself before the return of it.

IV. *Of defects in process.*

It would swell out this branch of the subject to an insufferable length, to detail the tedious string of decisions founded upon petit defects in process; it would not,

(*m*) See 2 Haw. c. 27. s. 13.

(*p*) 2 Haw. c. 27. s. 19.

(*n*) 2 Haw. c. 27. s. 19.

(*q*) 2 Hale, 225.

(*o*) 19 H. 8. 1. 2 Haw. c.

(*r*) 2 Haw. c. 27. s. 20.

27. s. 19.

however, be proper to dismiss the subject without some general observations.

1. A *discontinuance* is of two kinds, the first consists in suffering a total chasm in the proceedings, whether on the roll or in the process, by not giving a fresh continuance *instantly* upon the determination of the preceding one (*s*). As where a second writ is not tested on the day of the return of the preceding one (*t*), or where, after issue joined, the process is not continued, from time to time, against the jurors, returnable on the same day to which the suit is continued on the roll against the parties (*u*). And with respect to discontinuances of this description, it is a general rule that they are not cured by the appearance of the party, or even by his pleading over (*y*).

The second kind of discontinuance seems to consist of cases where, though there is an actual continuance upon the roll and of process, yet it is defective and void in point of law; as where a whole term intervenes between the teste and return of a *capias*, which the law will not permit least the defendant should be imprisoned an unreasonable time (*z*), but the same objection does not apply to continuance of an original by any other process, though a term should intervene between the teste and return (*a*).

So, if after issue or demurrer, a day is given to a distant term without making any continuance to the next (*b*).

Or if any of the parties be described in any continuance of the suit, whether on the roll or by process,

(*s*) 2 Haw. c. 27. s. 102.

(*z*) 2 Haw. c. 27. s. 8. Dy. 175.

(*t*) 1 Salk. 51. 6 Mod. 281.

(*a*) Ib.

Yel. 204.

(*b*) Cro. J. 236. Yel. 169.

(*u*) 2 Haw. c. 27. s. 90.

1 Buls. 144. 3 Buls. 233.

(*y*) 1 Buls. 143. Yel. 204.

2 Haw. c. 27. s. 102.

by a name or addition which varies from the original (*b*); or if a *venire* omit any of the parties (*c*); or if a *venire* or *distringas* be issued without any award on the roll to warrant it (*d*).

But a discontinuance of this kind, the defendant having a day on the roll, is cured by his appearance (*e*); for, it has been asked, would it not be as trifling, to dismiss a person only in order to send for him again. And in criminal cases it could not but be of the utmost inconvenience to give the defendant, who is actually in the power of the court, an opportunity of escaping (*f*).

But a discontinuance of any kind, in process against jurors, has the same effect with a chasm in the process; but such a discontinuance will not abate the original proceeding. If it appear before the trial, the court will direct new process to be awarded where the first fault happened (*g*); if after trial, a new *venire*, to have the whole issue tried again, for the first trial was unwarranted. But if judgment be given on a verdict by a jury erroneously procured, it will be erroneous (*h*).

So it seems that any other error in the process against jurors, will occasion a *mistrial* as much as those which are termed *discontinuances* (*i*); as where an improper process (*k*) is awarded, where it is directed to a wrong offi-

(*b*) Br. Am. 22. 4 H. 6. 6. 6 Mod. 281. 1 Salk. 51. Cro. 40 E. 3. 18. 2 Haw. c. 27. J. 284.

89. (*f*) 2 Haw. c. 27. s. 103.

(*c*) F. Dis. 10. 35. 2 H. 5. 3. 2 Haw. c. 27. s. 93. (*g*) 19 H. 6. 39. 34 H. 6. 20. 2 Haw. c. 27. s. 104.

(*d*) F. Error. 16. 7 H. 6. 28. (*h*) F. Jud. 12. Error, 16. 22 E. 3. 2.

(*e*) Buls. 141. Yel. 204. (*i*) 2 Haw. c. 27. s. 105.

(*k*) 7 H. 6. 28.

cer (*k*), has a wrong (*l*) venire, misrecites former (*m*) process, is misreturned or not returned (*n*) at all. But if the error consist in a mere misprision of the clerk, and be discovered before trial, it seems to be amendable at common law (*o*).

2ndly. A *miscontinuance* appears to be any error in process which does not amount to a discontinuance.

It has not unfrequently been holden, that if a defendant, upon his appearance, expressly except to an inferior error of this nature before he has pleaded over, he ought to be discharged, and that new process should issue where the defect first happened; but stronger authorities deny this doctrine (*p*); from these it appears that, if the original be good, and the defendant be present in court, he shall be compelled to answer it notwithstanding any defect in the process, provided it do not amount to a discontinuance; for the end of a process is to compel an appearance, and that end being served, and a legal charge appearing against the defendant no way discontinued, the law will not so far regard a slip in the process as to let the defendant out of court in order only to have him brought in again in better form (*q*): In the case of *Widdrington v. Charlton*, it was resolved by the court of King's Bench, upon great deliberation, that the defendant upon an appeal of death coming in upon the *exigent*, which was erroneous for want of the words *de morte viri*, had cured the error by his appearance, although he craved over of the process and demurred (*r*).

(*k*) Cro. Eliz. 574. 586. Yel. Sid. 100. 260. F. Error, 47. 46  
15. 5 Co. 36. E. 3. 30. B. Error, 28. 2 Haw.

(*l*) Cro. Eliz. 468. c. 27. s. 102.

(*m*) Cro. J. 89. (*q*) 2 Haw. c. 27. s. 102.

(*n*) 8 Co. 310. 2 Haw. c. 27. (*r*) 10 Mod. 86. 1 Salk. 59.  
s. 105. Note, Mr. J. Powell differed

(*o*) 2 Haw. c. 27. s. 103. from his brethren.

(*p*) 2 Haw. c. 27. s. 102.

3dly. A cause civil or criminal is put without day, when the justices before whom it is depending do not come on the day to which it is continued, the consequence of which is a discontinuance.

Upon such a discontinuance the ancient practice was to award a re-summons or re-attachment; which, if special, revived the whole proceeding, if general, the original record only (*r*).

By the common law, all proceedings upon any indictment, information, or popular action, whereon no judgment had been given, were determined by the demise of the king, and nothing remained but the indictment, information, &c. which were put without day till re-continued by re-attachment(*s*), &c.; but by the stat. 4 & 5 W. 3. c. 18. and 1 Ann. c. 8. it is provided that such process, &c. shall continue in the same force after the king's death as if he had lived.

Although any error short of an actual discontinuance seems to be cured by appearance; yet, if a man be outlawed, or condemned by default for not appearing to process which is in any respect erroneous, he may for that error, avoid such outlawry or other condemnation, for no one shall be condemned for not appearing where that which should have compelled him to appear is erroneous (*t*). So if he were subject to any disadvantage in respect of such process, he may avoid it by insisting on the error (*u*); and, therefore, if a *pluries* or *exigent* be erroneously awarded, he shall not lose the advantage of appearing by attorney, or forfeit his goods, though he is liable to answer the original as if the error had not existed.

(*r*) 7 Co. 20, 2 Haw. c. 27, s. 101.

(*s*) 2 Haw. c. 27. s. 99.

(*t*) 2 Haw. c. 27. s. 107.

(*u*) See 2 Haw. c. 27. s. 106. and the authorities there referred to.

## CHAP. XVII.

*Motion to quash the Indictment.*

I. *At the Instance of the Prosecutor, p. 282.*

II. *Of the Defendant, p. 283.*

WHERE the indictment is defective, the court has a discretionary power to quash it in the first instance, without putting the defendant to plead to it (a).

But this is a matter of pure discretion, and will not be granted, as of course, at the application of either party (b).

And the defect itself must be very gross and apparent to induce the court to dismiss the indictment in this summary way, instead of leaving the party to his demurrer, motion in arrest of judgment, or writ of error, according to the regular mode of proceeding (c).

And, generally, the application should be made before plea pleaded (d).

The motion is made either by the prosecutor or the defendant.

- |                                |                                 |
|--------------------------------|---------------------------------|
| (a) Com. Dig. Ind. H.          | (b) Burr. 1127.                 |
| Burr. 1127. 4 T. R. 135. 1     | (c) 1 Bl. 275.                  |
| Sid. 54. 247. 2 Keb. 128.      | (d) 4 St. Tr. 673. Rook-        |
| 1 Keb. 45. Cro. Car. 584.      | wood's case, Leach, 14. Frith's |
| Pal. 389. Salk. 372. 4 St. Tr. | case.                           |
| 134. Str. 602. 1 T. R. 316.    |                                 |
| 1 Wils. 325. Ja. 27.           |                                 |

If the prosecutor move, the court will not quash the indictment unless it appear to be insufficient (*e*); nor even then, unless another has been found which is sufficient (*f*).

And will not quash it, of course, where the defendant has been put to expense (*g*).

And if a second indictment be found for the same offence, pending the first, the court will not quash the first unless the expenses incurred by the defendant, upon the first, be paid to him (*h*).

Where an indictment, removed by *certiorari*, was at issue, and the jury appointed, and the prosecutor afterwards procured a new indictment to be found, alleging the first to be defective, the court, upon consent of the parties, quashed the first and directed the second to stand in its place (*i*).

In case of removal by *certiorari*, the court will not quash the indictment after a forfeiture of the recognisance by not carrying the record down for trial (*k*).

And in general the application must be made before the defendant has pleaded (*l*).

When an information is filed by the attorney-general, *ex officio*, the court will quash it upon motion, if there be cause; but if the information be exhibited by a private person, the court will not quash it upon motion, because the defendant is entitled to costs (*m*).

(*e*) Doug. 240. 153.

(*i*) 6 Mod. 262.

(*f*) R. v. Dr. Wynne, 2 East, R. 226.

(*k*) Salk. 380.

(*g*) R. v. Webb, 3 Burr. 1468. 1 Str. 946.

(*l*) Leach, 14.

(*h*) MSS. Mich. Term, 53 Geo. 3.

(*m*) Per curiam, Fountain's case, Sid. 152.

Where the *defendant* moves, and the indictment plainly appears to be insufficient for the purposes of justice, the court will, it seems, quash it, except in some cases, where the nature of the offence renders it inexpedient to shew any indulgence to the offender. And this has been done, where the court, in which the indictment was found, *wanted jurisdiction*.

As where an indictment was found at the quarter sessions for perjury at common law (*n*).

For mere want of form; as where the indictment alleged, that it was presented, &c. without adding, on the oaths of 12 men, &c. (*o*).

The caption of an indictment was, "it is presented that the several *indictments* to this schedule annexed are true bills," and they were quashed upon the objection, that till found they are bills, and not indictments (*p*).

For misjoinder of defendants; as where an indictment charged six jointly or severally with exercising a trade (*q*).

Or charged several defendants with the same perjury (*r*).

For want of a substantial averment; as where an indictment for not receiving an apprentice did not aver that the binding was within the stat. 43 Eliz. c. 2.

So where the indictment for maintaining a cottage without laying four acres of land thereto, alleged, that the defendant maintained it for habitation, without saying that it was inhabited (*s*).

So where an indictment for saying to a justice "you do

(*n*) R. v. Bainton, Str. 1088.      (*r*) R. v. Phillips, et al. Str.

(*o*) R. v. Burkett, Andr. 921. see also 6 Mod. 210.

226.

(*s*) R. v. Burkett, Andr.

(*p*) R. v. Brown, Salk. 376. 230.

(*q*) R. v. Weston, Str. 623.



not right," did not aver that the words were spoken to the justice in the execution of his office (*t*).

Where the facts charged, supposing them to be true, did not amount to an indictable offence (*u*).

But the court has refused to quash indictments for offences of an heinous nature, such as treason and felony (*x*).

So in case of indictments for offences of a fraudulent nature.

As for cheating by false weights or otherwise (*y*).

And the court refused to quash an indictment for selling flour by false weights, though it appeared, on the face of the indictment, that the flour-scale was the lighter (*z*).

So in the case of the *King v. Wadsworth* (*a*), the court said it is against the course of the court to quash an indictment against a person for extortion or oppression.

So where an indictment charges any offence immediately affecting the public at large. Upon a motion (*b*) to quash an indictment upon the stat. West. 2. c. 4. for pulling down hedges, Lord Holt said, we never quash indictments for forgery, perjury, subornation, or any crime concerning the highways (*c*).

And upon a like motion, the court said, that they would not quash an indictment for enticing away another person's servant, upon motion, or for a nuisance, or for any heinous crime (*d*).

An indictment charged, that six defendants, along

(*t*) *R. v. Leafe*, Andr. 226.

(*a*) 5 Mod. 13.

(*u*) Doug. 153.

(*b*) *R. v. Inhabitants of Bel-*  
*ton*, Salk. 372.

(*x*) Com. Dig. Ind. H.

(*c*) 1 Sid. 140.

(*y*) 6 Mod. 42. 3 Burr.

1841.

(*d*) Salk. 372.

(*z*) 3 Burr. 1841.

with several others, unlawfully assembled to disturb the peace, and broke and entered a lead mine, and unlawfully took and carried away a certain quantity of lead.

It was moved to quash the indictment on the ground that this was the subject matter of an action of trover or trespass, and not a matter of public concern. But the court, considering the number of persons collected together, held, that the defendants were not entitled to any indulgence, since this assembly was at a time in Cumberland when the judges were trying other persons for the like offence at Carlisle (*b*).

So the court refused to quash an indictment for a forcible entry (*c*).

For a disturbance in church (*d*).

Against overseers for refusing to pay over money to their successors (*e*).

But where the motion has been accompanied with a certificate that the nuisance complained of has been removed, the court has quashed the indictment.

Since informations are preferred for great offences only, and such as are likely to prejudice the commonwealth, the court, it is said, will not quash one upon motion (*f*).

A motion may be made to quash an indictment on the last day of term (*g*).

With respect to indictments for high treason or misprision thereof (except only indictments for counterfeiting the king's coin, seal, sign, or signet) it is provided by the stat. 7 Will. 3. c. 3. that none shall be quashed for

(*b*) *R. v. Johnson*, 1 Wils. 325.

(*c*) 6 Mod. 95.

(*d*) *Cro. Car.* 584.

(*e*) *R. v. King*, Str. 1268.

(*f*) *Vin. Ab. Inf.* 415. i. e. at the instance of the defendant.

(*g*) *Burr.* 651.

mis-writing, mis-spelling, false, or improper Latin, unless exception concerning the same be taken and made in court by the prisoner or his counsel assigned before any evidence given in open court upon such indictment; nor shall any such mis-writing, mis-spelling, false, or improper Latin, after conviction upon such indictment, be any cause to stay or arrest judgment thereupon. But nevertheless any judgment given upon such indictment shall and may be liable to be reversed upon a writ of error in the same manner, and in no other than as if this act had not been made.

Under this statute it has been holden, that no such exception can be taken after plea pleaded (*h*).

(*h*) Rookwood's case, 4 St. Tr. 673. See East. P. C. 110.

## CHAP. XVIII.

*Arraignment.*

**I**N all cases of treason and felony, and of misdemeanors, where the defendant is in custody (a) he is arraigned at the bar of the court; or, in other words, he is asked by the proper officer whether he is guilty or not of the offence with which he is charged.

According to some authorities the accused should be brought to the bar for this purpose free from fetters, un-

(a) If the defendant appear upon an indictment of treason or felony, he is generally arraigned or put to plead immediately. Com. Dig. Ind. L. And the rule is the same in case of misdemeanor, if he appear upon the *capias*, for he was guilty of a contempt in not appearing upon the *venire*. Ib. So if he appear upon his recognisance, or if he appear in his own person in a case of privilege. Ib. But if the defendant appear upon summons to a *venire* or *subpœna*, he is entitled to an imparlance. Seven Bishops' case, St. Tr. And if he plead immediately, he need not try till the next term. But if he does not plead, until he be served with a *peremptory rule*, he must give bail to try it at the same term. The Queen v. Orbell, 6 Mod. 42.

If the defendant plead in court, he is committed till trial, unless he give security to try at his own charge; and if he plead in the office, the plea is not to be received without giving such security. 6 Mod. 114:

less some danger be apprehended. But in Layer's case (b), and in subsequent (c) instances, the courts have distinguished between the time of arraignment, and the time

Com. Dig. Ind. L. But if the defendant be committed, the prosecution must be maintained at the prosecutor's expense. 6 Mod. 114. Upon an indictment for mayhem, though it be laid *felonicè*, it is not necessary that the defendant should be brought to the bar to plead, but his plea may be delivered in the office, since the judgment does not now affect life or member. Str. 1100. R. v. Haydock.

Upon a demurrer to the defendant's plea, upon an indictment for a misdemeanor, besides the common four-day rule to join in demurrer, there must be a peremptory rule giving him a day certain in the discretion of the court, without which judgment cannot be signed against him. R. v. Johnson, 6 East, 383.

In capital cases no rule is given to plead, or to join in demurrer, for all proceedings in such case being at bar, the prisoner is bound to answer instantly; but in prosecutions for misdemeanors, two four-day

rules to plead are given, and a peremptory rule moved; and then, if there be a demurrer, one four-day rule to join in demurrer is given.

When the party appears at the sessions according to his recognisance to answer an indictment, which indictment has been found, the usual course is for him to enter into a recognisance with two sureties, to try at the sessions following.

If a man be bound by recognisance to appear and plead to an information the first day of term, and is charged upon appearance with an information, if the information be laid in Middlesex, he has all that term for time to plead to it, so that he cannot be tried that term; but in case it be laid in another county, he shall have time to plead till the next term. 2 Salk. 514. As to the time for pleading, when the defendant is in custody, see p. 274.

(b) 6 St. Tr. 230.

(c) See Waite's case, Leach, 33.

of trial, and have refused to liberate the prisoner from his irons whilst he was arraigned.

For the purpose of identifying the person of the prisoner, it is usual to direct him to hold up his hand, but this ceremony is not essential; the object is answered if the prisoner admit that he is the same person (*d*).

The indictment is then read over to him, and he is asked, whether he is guilty of the crime (*e*) whereof he is indicted or not guilty, and he then either stands mute, or confesses the fact, or pleads to the indictment.

The entry of the arraignment upon the record is in this form: "And being brought to the bar here, in his own proper person, he is committed to the marshal, &c. And being asked how he will acquit himself of the premises (*in case of felony*, or of the high treasons, *in case of treason*,) above laid to his charge, saith, &c."; and the record, it seems, would be erroneous, if it omitted so important a part of the proceeding (*f*).

Where there are two indictments against the defendant for the same offence, it is usual to arraign him upon both, and to try him upon both at the same time (*g*).

At common law, a man appealed of several robberies may be severally arraigned and tried on each appeal (*h*); in order that each appellant may be equally entitled to restitution of his goods; and so he may upon several indictments, for each prosecutor is entitled to a restitution

(*d*) 2 Haw. c. 28. s. 2. 4 Bl. Comm. 323.

(*e*) Whilst indictments were drawn in Latin, the arraignment was in English, by virtue of the stat. 37 E. 3. c. 15. See also 4 G. 2. c. 26. 6 G. 2. c. 6.

(*f*) 3 Mod. 263. 2 Haw. c. 28. s. 6. But qu. whether necessary in case of an appeal. Ib.

(*g*) R. v. Culliford, Salk. 382.

(*h*) 2 Haw. c. 28. s. 7.

of his goods upon conviction, by virtue of the stat. 21 H. 8. c. 11.

An accessory may be arraigned, but it seems clear, that he cannot be tried before the principal has appeared, unless at his own request (*i*); and even then, if he be convicted, judgment should be respited until the conviction, &c. of the principal.

Where the attainder of the principal was prevented by his death, by his standing mute, challenging above 35 jurors peremptorily, where he was admitted to the benefit of clergy or pardoned, the accessory could not be arraigned (*k*); and yet in these cases, the reason why the accessory shall not be tried before his principal, viz. least the conviction of the principal should be contradicted by an acquittal of the principal, seems to fail; for in such cases, the principal could not afterwards be acquitted, and therefore the absurdity could not arise.

But by the stat. 1 Ann. sess. 2. c. 9. s. 1. if the principal be convicted, stand mute, challenge above 20 jurors peremptorily, the accessory shall be proceeded against as upon an attainder of the principal, although the principal felon be admitted to the benefit of clergy, be pardoned, or otherwise delivered before his attainder.

And at common law, it seems, that the death or pardon of the principal, *after his attainder*, would be of no avail to the accessory.

If there be several principals, and the defendant be indicted as accessory to one only, it is clear (*l*), that he may be tried as accessory to him, though the others have not appeared.

But if he be indicted as accessory to several, and one

(*i*) 2 Haw. c. 29. s. 45. 1  
Hale, 623.

(*k*) Fost. 361.

(*l*) See 2 Haw. c. 29. s. 41.

only has appeared, it has been questioned (*m*), whether he can be tried as accessory after the conviction of the latter; but it seems now to be settled that he may (*n*), and that he may be convicted upon evidence of his being accessory to one, though he be charged as accessory to several.

If the principal and accessory appear together, and the principal plead the general issue, the accessory may be arraigned, and if he also plead the general issue, both may be tried by one inquest. But the principal must be convicted before the accessory; and the jury are charged by the court, that if they find the principal not guilty, they must acquit the accessory (*o*). But if the principal plead in abatement or in bar, the accessory is not arraigned till the plea of the principal be determined (*p*).

Where the principal and accessory are tried by the same inquest, it is competent to the latter to enter into a full defence of the former, and to avail himself of every matter of fact, and of every point of law tending to his acquittal; and when the accessory is tried after the conviction of the principal, and it appears, that the principal was not guilty of the felony as charged in the indictment, the accessory ought to be acquitted (*q*).

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| <p>(<i>m</i>) 2 Haw. c. 29. s. 46. Summ. 222. 1 Hale, 624. Lord Hale, upon the authority of Gittin's case, Plowd. Com. 98. says, that in such case the court may arraign the defendant as accessory to him who has appeared, and that if he be acquitted, he may afterwards be</p> | <p>indicted as accessory to the rest. See Staundf. 46. 7 H. 4. 36.<br/> (<i>n</i>) Fost. 361. 9 Co. 119.<br/> (<i>o</i>) 2 Haw. c. 29. s. 47. 2 Hale, 625.<br/> (<i>p</i>) 2 Ins. 184. Fost. 360.<br/> (<i>q</i>) Fost. 121. 365. 10 St. Tr. 417. R. v. Smith, Leach, 323.</p> |
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## CHAP. XIX.

*Plea.*

THE prisoner, being brought to the bar and arraigned, either stands mute, or confesses the charge, or answers in one of the following ways: 1. By a plea to the jurisdiction; 2. by a declinatory plea; 3. by a plea in abatement of the indictment for some defect contained in it; 4. by demurrer; 5. by a plea in bar; 6. by the general plea, that he is not guilty.

I. *By a plea to the jurisdiction.*

By this plea, the defendant totally denies the authority of the court to try him; as where an indictment for rape has been found before the sheriff in his torn, which he has delivered to the justices, then because the sheriff had no authority to take such an indictment, the defendant may plead to the jurisdiction without making any answer to the charge itself (a). So if justices of the peace should arraign a defendant for treason (b). But it seems, that the defendant cannot plead to an indictment before justices, that the offence was committed at some place beyond their jurisdiction, for this would amount to no more than the general issue (c). After a plea to the jurisdiction overruled, it seems that the judgment should

(a) 2 Hale, 256. 22 E. 4. 22.

(c) See Trem. P. C. 271.

(b) 2 Hale, 256.

in all cases be to answer over to the charge in the indictment (d).

II. *Declinatory pleas.*

These were of two (e) kinds: first, the plea of privilege of sanctuary; by which a defendant, who had fled to a place of sanctuary, claimed under certain restrictions protection from process, and a right of being remanded if taken against his will, without being compelled to answer in any court of justice. But this privilege was abolished in the reign of James the first (f). Secondly, the benefit of clergy; but since no advantage can now be gained by this plea, which the defendant would not be equally entitled to after conviction; and since he would, by pleading it, lose the chance of an acquittal, the benefit of clergy is rarely pleaded, but, if necessary, is prayed by the convict before judgment (g).

III. *By plea in abatement.*

Pleas in abatement are founded either on some defect apparent on the face of the record, or upon some matter of fact extrinsic of the record, which render it insufficient.

1. *On some defect apparent upon the record.*

A prisoner indicted for felony cannot be allowed to have a copy of the indictment, though it is otherwise in cases of treason and misdemeanors (h); but the court will order an indictment for felony to be slowly read over to the prisoner, to afford him an opportunity of taking exceptions or preparing his plea (i).

(d) R. v. Holles and others, Trem. 302.

(e) 2 Haw. c. 32.

(f) 21 J. 1. c. 28.

(g) 2 Hale, 236. 4 Bl. Hale, 236. Comm. 333.

(h) In treason, which works corruption of blood, and imprisonment of treason, by virtue of the stat. 7 W. 3. c. 3. See 2

(i) 2 Hale, 236.

It seems in general that any defect, which, in any stage of the criminal proceeding, will vitiate the indictment, may be taken advantage of by plea in abatement (*h*).

And some defects must be pleaded in abatement, if insisted upon at all; such as the want of an addition, or the insertion of an improper one. So under the stat. 7 W. 3. c. 3. exceptions to indictments for high treason, (whereby any corruption of blood may be made,) on the ground of mis-writing, mis-spelling, false or improper Latin, must be taken before any evidence given upon such indictment, and shall be no ground of arresting the judgment. But little advantage is in general to be gained by a plea of this kind; since, with a few exceptions, the defendant will be entitled to the advantage of his objection after the trial (*i*); and should his plea be allowed, the court would direct a new bill to be sent out to the grand jury, or, if they had been discharged, would detain the prisoner till the next assizes or sessions (*k*).

2ndly. *Upon such defects as arise from facts dehors the record.*

If the defendant be indicted by a wrong name, or be described by an improper addition, he may plead it; and if the fact be found for him, the indictment shall be abated (*l*). In case of misdemeanors, the defendant may plead misnomer by attorney (*m*). And in some instances, the plea has been allowed when made *ore tenus* (*n*). But regularly every plea of this kind ought to be tendered in writing (*o*), and should be verified by affidavit (*p*). In case of indictments, the defendant may plead misnomer

(*h*) 2 Hale, 236.

(*n*) Dean's case, Leach, 535.

(*i*) 2 Hale, 237.

(*o*) Layer's case, 6 St. Tr.

(*k*) Ib. 2 Haw. c. 34. s. 2. 237.

(*l*) 2 Hale, 236.

(*p*) R. v. Grainger, 3 Burr.

(*m*) 10 East, 83.

1617.

either of his christian or of his surname, but he must in his plea set forth his real name, by which, upon a fresh indictment, he would be concluded (*q*). And the king may reply, that he is known by the one name as well as the other (*r*). But in an appeal such a replication is not allowable (*s*), and the appellant must take issue. To an indictment against Charles Knowles for murder, he pleaded, that his grandfather was created Earl of Banbury by letters patent under the great seal of England, which he produced in court; the attorney-general replied, that the defendant, on, &c. petitioned the lords in parliament to be tried by his peers; and that the lords disallowed his claim; the defendant demurred, and his demurrer was allowed on the ground, that the refusal of the lords could not operate as a judgment (*t*).

And in general, where a peer is named as a commoner, he may plead the misnomer in abatement, since the title is part of his name, and he ought to be tried by his peers; but in such case he ought to set forth the writ, &c. testifying his title upon the plea; because it is but a dilatory plea, and must be tried, not by the country (*u*) but by the record. But a plea that the defendant is a peeress by marriage, involves a question of fact extrinsic of the record, and must be tried by the country (*x*).

In all cases of felony, the defendant pleading in abatement should plead over to the felony; for he is not concluded by pleading a false fact (*y*).

But in case of misdemeanor and mayhem, the defen-

(*q*) 2 Hale, 238. and see p. Countess of Rutland's case. 35 H. 6. 46.

(*r*) 2 Hale, 238.

(1) 6 Co. 53. 2 Hale, 240.

(*s*) 1 H. 7. 29. 21 E. 3. 47. 2 Hale, 238.

(*y*) Dy. 88. 21 E. 4. 71.

(*t*) 2 Salk. 509.

Dean's case, Leach, 535. Salk. 171.

(*u*) 2 Hale, 240. 6 Co. 53.

dant cannot plead the general issue with a plea in abatement; and, if upon a plea in abatement, the fact be found against the defendant, he will not be permitted to plead over (z), though it would be otherwise, if the plea were to be decided against him on *demurrer* (a).

Upon a plea of this kind the sheriff usually returns a jury *instantly*, which generally consists of the persons ready at the bar to try the prisoner upon the indictment.

At common law it seems to have been doubtful, whether it was not necessary to try foreign pleas in (b) a foreign county, but the general practice seems to have been otherwise (c); and by the provisions of the stat. 22 H. 8. c. 14. 28 H. 8. c. 1. and 32 H. 8. c. 3. all foreign pleas shall be tried by a jury of the same county where the party was indicted; but these statutes do not extend to an indictment for treason, foreign pleas to which must be tried as at common law (d).

Where a second indictment is found against a defendant, upon which he is arraigned after pleading to the first, but before the trial, and both indictments are founded on the same transaction, the defendant cannot plead the pendency of the first in abatement (e), because it is the king's suit; but in such case it is usual for the justices to quash the other upon motion. And it is the usual course to prefer an indictment for murder before the grand jury, though an inquisition of murder has been

(z) *R. v. Gibson*, 8 East, 107. *Shapcott*, East, 541. 2 Wils. Cro. Eliz. 495. 367.

(a) *Trem. P. C.* 188. *R. v.* 5 E. 4. 2. So held as to Earl of Devon. *R. v. Johnson*, the addition of *place*, 2 Hale, 6 East, 602. But see *R. v.* 238.

*Gibson*, 8 East, 107. 2 Haw. (e) 34 H. 6. 50. 1 E. 4. 3. c. 31. s. 6, 7.; *semble*, where (d) 3 Inst. 27.

*judgment* is given on *demurrer* (e) *R. v. Swan and Jefferies*, to a plea in abatement, it is to *Fost.* 106.

answer over. See *Bowen v.*

returned by the coroner, and to arraign the prisoner and try him upon both at the same time (*f*).

#### IV. *By demurrer.*

By a demurrer the defendant refers it to the court, to pronounce whether, admitting the matters of fact alleged against him to be true, they do, in point of law, constitute him guilty of an offence sufficiently charged against him. And a demurrer puts the legality of the whole of the proceedings in issue, as far as they judicially appear; for the court is bound to examine (*g*) the whole record, to see whether they are warranted in giving judgment upon it; and it is open to objections not only to the subject matter of the indictment, but also to the jurisdiction of the court in which the indictment was found (*h*). But this plea is not very frequently resorted to in practice, since the defendant may take advantage of the same exceptions after a conviction by motion in arrest of judgment (*i*), and in cases not capital he would be concluded by judgment against him, and therefore by demurring would lose the chance of an acquittal. Some doubt, indeed, seems to have been entertained, whether in capital cases the defendant is concluded by his demurrer, which amounts to a confession of the facts (*k*); it has been humanely said, that though a man may by mispleading lose his property, he shall not by such niceties lose his life; yet, humane as this doctrine is, it scarcely seems to be warranted upon legal principles; for if by a plea of guilty a defendant can be admitted to confess the whole of the charge, including both law and fact, there seems to be no reason why he should not be bound by a partial ad-

(*f*) 2 Hale, 239.

court by *certiorari* or other-

(*g*) *R. v. Fearnley*, 1 T. R.

wise.

316.

(*i*) 2 Hale, 257.

(*h*) 1 T. R. 320. i. e. supposing the indictment to have been removed into another

(*k*) 2 Hale, 257. 2 Haw. 354.  
4 Bl. Comm. 334.

mission which confesses the facts but submits the matter of law to the consideration of the court. The humanity which is constantly displayed in the administration of criminal justice, and which never permits an admission of guilt, in a capital case, to be recorded without reluctance, dictates, no doubt, a contrary course; but it is difficult to conceive that it is obligatory on the court, after deciding against the defendant on demurrer, to receive his plea of not guilty (z).

#### V. *Plea in bar*.

By a plea in bar the defendant shews, by matter extrinsic of the record, that the indictment is not maintainable. The most usual special pleas, in answer to a charge of felony, consist either of matter of fact mixed with matter of record, or secondly, of matter of record only. The former are of three kinds: 1. *Auter-foits acquit*. 2. *Auter-foits convict*. 3. *Auter-foits attain*. Of the latter kind is the plea of *pardon*.

##### 1. *Auter-foits acquit*.

This plea is grounded upon an universal maxim of the common law of England, that no one ought to be brought into jeopardy of his life twice for the same offence (a). There exists, however, one exception to this rule, the history of which is shortly this. Since an acquittal upon an indictment of homicide would have barred an appeal, it was deemed expedient, by the courts, to refuse to try an indictment until after the expiration of the year and the day limited for bringing an appeal; but, in the interval, it frequently happened, that the witnesses died or

(z) Since the demurrer is a course remained but to pronounce sentence of death. 2 *et dure* could be given, after it *Halé*, 257.  
 had been overruled; and therefore, if the defendant in such case refused to plead over, no (a) 4 Co. 40. 2 Haw. c. 35. s. 1.

the whole was forgotten. To remedy this inconvenience, the stat. 3 H. 7. c. 1. enacts, that the indictment shall be proceeded on immediately at the king's suit, for the death of a man, without waiting for an appeal, and that the plea of *auter-foit acquit*, or *auter-foit attain*, upon an indictment, shall be no bar to an appeal.

The plea must shew, by proper averments,

1. *The manner and circumstances of the acquittal itself.*

2dly. *The identity of the offence.*

3dly. *The identity of the party.*

1. *The manner and circumstances of the acquittal itself.*

In the first place, the plea must set forth the substance of the record of his acquittal. There is a wide difference between the pleading a record of acquittal, and the pleading a record in bar of a civil action. In the latter case, if a record be pleaded in bar, the plaintiff shall have oyer of it, if it be a record of the same court; but if it be a record of another court, he must plead *nul tiel record*, and a day is given to certify the tenor of such record.

But in criminal cases, in order to avoid false pleas and surmises which would be productive of great delay, the defendant is required not only to shew the nature of the former prosecution and acquittal with certainty in his plea, but also to shew the record or its tenor to the court by producing or vouching it at the time he pleaded, for otherwise it would be in the power of the prisoner to delay his trial when he pleased, by pleading an acquittal in another court. In order to prevent this delay he must shew the record, or vouch it, if it be in the same court, in the first instance (b), and is not to wait till *nul tiel record* be pleaded (c).

(b) Staunf. and 21 H. 7. 9. opinion, 2 Haw. c. 35. s. 2.  
contra. and cites 1 Ins. 128. and Bro.

(c) 2 Hale, 241.243.255. Serjeant Hawkins is of a different  
Cor. 218.; but the former relates to pleading in bar of a civil



But the court, upon application for that purpose by the defendant, will, in its discretion, respite his plea in order to the production of the record (*d*), or a certificate of its tenor in one of the following ways.

If the prisoner be arraigned in the King's Bench, the court will grant a writ of *certiorari* to remove the record before them, and respite his plea till the record be removed (*e*).

In other cases, if the record be not of the same court in which the defendant is arraigned, he may proceed in two ways, either by removing the tenor of the record of acquittal into chancery by *certiorari*, and then producing it in court with his own hands (having it *en poigne*), or by procuring it to be sent by mittimus to the justices *sub pede sigilli* (*f*).

But the record must be removed by writ, though the justices may receive a record without writ, where it is to be proceeded on for the king (*g*).

The defendant being thus prepared with the record of his acquittal, or the tenor of it properly certified, must recite it in his plea, which for the truth of such recital refers to or vouches the record, (*h*) &c.

action only, and according to the latter, it was merely decided that the record ought to be brought before the court by writ, for in that case the record produced did not appear to be in any way authenticated, so that the case is no authority to shew that the record is not to be produced by some means or other. See Bro. Cor. 29. 11 H. 4. 41. 9 H. 7. 19. 26 Ass. 16.

(*d*) See 2 Hale, 243. 2 Haw. c. 35. s. 2.

(*e*) 20 E. 2. Coron. 232.

(*f*) 2 Hale, 242. 2 E. 3. 26. Coron. 150.

(*g*) 2 Hale, 242. 8 E. 4. 18. B. Cor. 218.

(*h*) It has hitherto been supposed that the defendant is pleading an acquittal in some court in this country whose record of the proceeding may by proper means, be procured.

And upon this recital the plea will fail, unless it appear that the defendant was *legitimo modo acquietatus* (i), by *judgment* either upon verdict or by battle. Hence, if a prisoner be committed on a charge of felony, but no bill be found, so that at the end of the sessions he is acquitted by proclamation, he may be afterwards indicted, for this is no acquittal (i).

So if A. in defending his house against burglars, kill one, and the matter be found specially by the coroner's inquest or grand inquest, whereupon he is discharged; he cannot, to a subsequent indictment for murder or man-slaughter, plead an acquittal by the grand inquest. But had he been indicted generally of murder or manslaughter, and pleaded not guilty, and the special matter had been found by the petty jury and judgment had been thereon given "*quod eat inde sine die*," the plea of *auter foits acquit* to a second indictment would be sufficient (k).

An acquittal in fact is available by way of plea, without regard to any mistake or error on the part of the jury or of the court in which the verdict was given. And, therefore, though a judge should direct the jury to acquit the prisoner because the offence was not proved to have been

Where the defendant has been tried by a foreign tribunal, it seems equally clear that an acquittal will enure to his defence in this country; but in such case an exemplification of the record of his acquittal would probably be deemed necessary. *Whit*, 3 Mod. 194. 1 Show. 6. 3 Keb. 785.

So an acquittal of murder at a grand sessions of Wales, may be pleaded to an indictment for the same in England. 2 Haw. c. 35. s. 10. 1 Lev. 118. 1 Sid. 179.

R. v. Roche, Leach, 160. (i) 2 Hale, 243. 246.

B. N. P. 245. *Beak v. Thyr-* (k) *Cromp. f. 28. Bull's case*, 26 Eliz. 2 Hale, 246.

this acquittal is pleadable (s). And if the prisoner be attainted, though upon an insufficient indictment, he cannot be arraigned again before the reversal of the judgment (t).

If a judgment in favour of a prisoner be reversed, upon a reversal of that judgment he is not to be executed upon the first indictment, though judgment of death ought to have been given upon it; but in *favorem vitæ* he shall be arraigned *de novo*, in order to give him the benefit of any other matter of defence (u).

2dly. *The identity of the offence.*

The plea must shew an acquittal from the offence charged *in law* and *in fact*.

1. *In point of law.*

The plea will be vicious if the offences charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.

Thus, if a man be acquitted when charged as *accessory* to a murder or robbery, he cannot plead the acquittal if he be afterwards charged as *principal* (x). But it is not necessary that the charges in the two

of murder, *therefore* dismissed him. It is true that there is great reason to suppose, that the judges of assize thought that the actual presence of the prisoner at the taking of the poison was essential to the crime, but still the judgment was valid until a reversal. The doctrine expounded in this case does not appear to consist with the general principle on which the plea of *autre fois acquit* is

said to depend, since an acquittal upon a special verdict would leave the defendant exposed to a second prosecution, whenever a formal flaw could be detected in the first indictment at any subsequent period. See 2 Hale, 395.

(s) 19 E. 3. Coron. 444.

(t) 4 Co. 44, 45.

(u) 2 Hale, 247.

(x) Staundf. 105. 2 Hale, 244. 27 Ass. 10. Fost. 361. Coron. 200.

indictments should be precisely the same, it is sufficient if an acquittal from the offence charged in the first indictment virtually includes an acquittal from that which is specified in the second, however the two offences charged may differ in degree. By way of illustration, let it be supposed that one offence is made up of the circumstances A. B. and C. and that another more general offence consists in the circumstances A. and B. alone. If a prisoner were to be indicted for the more complex offence, consisting of A. B. and C. and upon trial the jury found the circumstances A. and B. but not the circumstance C. it would be the duty of the jury to find the defendant guilty of the more general offence. The inference then to be drawn from a total acquittal under such circumstances is, that he is not guilty of the more general offence, and therefore an acquittal from the more special ought to be a bar to the more general charge.

So if the defendant be first indicted upon the more general charge, consisting of the circumstances A. and B. only, an acquittal obviously includes an acquittal from a more special charge consisting of the circumstances A. B. and C. for if he be not guilty of the former, he cannot be guilty of those with the addition of a third. But if one charge consist of the circumstances A. B. C. and another of the circumstances A. D. E. then, if the circumstance which belongs to them in common does not of itself constitute a distinct and substantive offence, an acquittal from the one charge cannot include an acquittal of the other.

Now for the application of this doctrine. An acquittal upon an indictment for murder will be a good plea to an indictment for the manslaughter (y) of the same person;

(y) 2 Hale, 246. Fost. 329.

and *è converso* an acquittal upon an indictment for manslaughter will be a good bar to an indictment for murder (z), for, in the first instance, had the defendant been guilty, not of murder but of manslaughter, he would have been found guilty of the latter offence; in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder.

But it is no defence to an indictment for (a) burglary laid with intent to commit a larciny, that the defendant has already been acquitted upon an indictment stating the same burglarious entry and the actual commission of the larciny; for though the burglarious entry be common to both indictments, it does not in itself constitute a substantive offence of which the defendant could have been found guilty upon the prior indictment; and as an actual larciny essentially differs from a mere intent, the defendant could not, upon the first indictment, have been found guilty of any part of the offence charged in the second, and therefore no inference in his favour can be drawn from an acquittal (b).

So the rule fails if the lesser offence be but a trespass, and the greater offence a felony, for upon an indictment for felony the defendant could not have been found guilty of the trespass (c).

Hence an acquittal of trespass will be no bar to an indictment for larciny (d).

But an acquittal upon an indictment of petit treason, where it is alleged that the defendant traitorously and fe-

(z) 2 Hale, 246. Fost. 329. Abbot, Leach, 816, but see Kel.

(a) R. v. Vandercomb and 30. 52. 2 Haw. c. 35. s. 5. Abbot, Leach, 816.; but see 2 (c) 2 Haw. c. 35. s. 5. West-beer's case, Leach, 15.

Haw. c. 35. s. 6. Kel. 30. 52.

(b) R. v. Vandercomb and (d) Ib. and 2 R. 3. 14. B. App. 121.

loniously did murder, will be a bar to a subsequent indictment for the murder of the same person, because the defendant might, if guilty, have been convicted of the murder upon the first indictment (*d*).

On the other hand, an acquittal on an indictment of murder, will be a good bar to an indictment for petit treason (*e*).

If a man be acquitted as principal, he cannot plead an acquittal to an indictment against him as accessory after the fact, for the acquittal exculpates him from the fact only, and he could not have been convicted on the first indictment, upon proof that he was merely an accessory after the fact, by receipt or otherwise, and, therefore, as accessory, was in no jeopardy; and the same principle extends to the case of an accessory before the fact, which appears to have been the ancient law (*f*), and to be the law at this day (*g*), notwithstanding several authorities to the contrary, some of which are founded on the erroneous position that an accessory before the fact may be found guilty upon an indictment charging him as principal (*h*).

2. *Of the same offence in fact.*

An acquittal may be pleaded to a second indictment which varies in many circumstances from the first, provided the defendant shew, by proper averments, that the charge is in substance the same.

For, notwithstanding many variances between the first indictment and the evidence, he might have been convicted upon proof of those facts which are alleged in the second

(*d*) 2 Haw. c. 35. s. 5. Fost. 325. 328. (g) Fost. 362. 2 Haw. c. 35. s. 11. Dalis, 14. Summ.

(*e*) 2 Haw. c. 35. s. 5. 1. 266. R. v. Atkins, St. Tr. 20 Hale, 378. tam. qu. and see Car. 2.

Fost. 104. 325. 328. (h) 8 H. 5. 6. F. Cor. 463.

(*f*) Staundf. 105. 2 Hale, 244. F. Coron. 424. 8 E. 2.

indictment; and, therefore, upon the latter, it seems to be competent to him to reconcile, in his plea, all such variances as would not have saved him upon the trial of the first indictment (*h*). Thus, if he be acquitted upon an indictment charging the commission of a murder on the first day of March, in the 10th year of the king's reign, and he be afterwards indicted for a murder alleged to have been perpetrated on the 1st day of March, in the 12th year of the same reign, he may plead *auter-foits acquit*, alleging the supposed offence to be the same (*i*). So if a man be acquitted of the murder of John Stiles, and be afterwards indicted for the murder of John Nokes, he may plead *auter-foits acquit*, and aver the person to be the same, notwithstanding the variance of the surname, for a man may have divers surnames. But where the names are different, the defendant should aver that he is known by the one name as well as by the other (*k*). So an acquittal of a robbery laid to have been committed in one vill may be pleaded to an indictment for a robbery laid to have been committed in another vill, provided both lie in the same county; but he cannot plead an acquittal in the county of B. to an indictment for a robbery laid in the county of C. because the justices in B. could not have inquired into the robbery in C. (*l*). But if an indictment in the county of B. be removed into the county C. an acquittal in B. is pleadable (*m*).

If A. commit a robbery in the county of B. and carry the goods into the county of C. though he cannot be indicted of the robbery in C. he may of the larciny, and an

(*h*) 2 Haw. c. 35. s. 3. Co- gan's case, Leach, 503. Keil. 53. (*k*) 26 Ass. 55. Coron. 189. 11 H. 4. 41. 2 Haw. c. 35. s. 3.

(*i*) 3 Ass. 15. 25 E. 3. Coron. 136. 22 Ass. 55. 2 Hale, 244. (*l*) 2 Hale, 245. 4 H. 7. 5. (*m*) 2 Hale, 245. 41 Ass. 9. 2 Haw. c. 35. s. 3.

acquittal of such larciny would be no bar to a subsequent indictment for a robbery in B.; neither would such an acquittal be a bar to an indictment of larciny in B. for perhaps the goods were never brought into C. and then the offence in B. never came in question, and the felony in B. is a distinct offence from the felony in C.(*m*).

If a man steal goods in the county A. and carry them into the county B. and be acquitted of the larciny in B. according to the opinion of Serjeant Hawkins (*n*), it is reasonable that the acquittal should be pleadable in B. for otherwise, by a fiction of law, the party would be twice in jeopardy for the same offence, and he conceived that the identity of the offences might be collaterally tried by the court or by a jury of B. (*o*). Without presuming to contradict a doctrine strenuously contended for by so able a lawyer, it may be observed, that if the law be against such a plea, the offender himself created the difficulty, and his case is not more hard than that of one who having been acquitted of stealing the horse, may still, according to Lord Hale, be convicted of stealing the saddle (*p*), though both were taken at the same time.

Lord Hale says, if A. commit a burglary stealing goods, an acquittal of the larciny will be no bar to an indictment for the burglary, and *é converso* an acquittal of the burglary is no defence to an indictment for the larciny, for they are several offences; there may be burglary where there is no larciny, and larciny where there is no burglary (*q*). But perhaps this limitation ought to be applied, viz. provided the indictment for burglary lay the offence with an

(*m*) 2 Hale, 245.

(*p*) 2 Hale, 246.

(*n*) 2 Haw. c. 35. s. 4. See  
2 Hale, 245. 41 Ass. 9.

(*q*) 2 Hale, 245. 2 Haw. c.  
35. s. 3. Staunforde, 105. con-

(*o*) F. Cor. 189. B. Cor. 98. tra.  
41 Ass. 9. 3 Ass. 15. F. Cor.  
160.



intent to steal, and not with an actual larciny; for if it be laid with an actual larciny, a general acquittal includes an acquittal of the larciny itself; and, on the other hand, if the defendant be not guilty of the larciny, he cannot be guilty of the burglary in which that larciny is made an essential ingredient (*p*).

Staundforde was of opinion, that an acquittal of homicide in one county, might be pleaded to an indictment for the death of the same person in another county, because the same person can be killed but once (*q*). But if the murder were really committed in the second county, the defendant was placed in no jeopardy by the inquiry in the first; if it was committed in the first, he is placed in no jeopardy by the indictment in the second, and, therefore, the ground of the plea entirely fails.

Cogan was indicted for publishing, as true, a certain forged will and testament, wick, as set out on the indictment, began, "I, T. G. do hereby, &c." the instrument proved in evidence begun thus, "T. G. do hereby, &c." and the variance was held to be fatal. He was afterwards indicted as before, except that in the recital of the will the pronoun *I* was left out, he pleaded *autre-fois acquit*, but the former record being produced, was holden to be insufficient to support the plea, since it was not legal evidence of his having been acquitted of the same offence, and the prisoner pleaded not guilty (*r*).

*3dly.* He must aver that he was the person who was charged, &c. as well as that the offence is the same with

(*p*) See p. 305, 306, 326. F. Cor. 375.; but this is contested by Serjeant Hawkins, 2 Haw. c. 35, s. 7, to whom the reader is referred.  
 (*q*) Staund. P. C. 106. Qu. whether an acquittal by battel in an appeal, be a bar to an indictment. According to Lord Hale it is no plea, and he cites (*r*) 2 Leach, 503.

which he was charged. If he be described by different additions in the two indictments, he may reconcile the variance by an averment that he was the person named in the former indictment (*s*).

And upon the averment of identity of person, as well as of the identity of the offence in fact, the court may admit the identity without any confession by the king's attorney (*t*); or an inquest may be charged to inquire into it (*u*).

*Plea of auter-foits convict.*

As a man once tried and acquitted of an offence is not again to be placed in jeopardy for the same cause, so *a fortiori*, if he has suffered the penalty due to his offence, his conviction ought to be a bar to a second indictment for the same offence, least he should be twice punished for the same crime (*x*).

After conviction the defendant either remains without receiving judgment or praying his clergy, or he prays his clergy without receiving judgment, or he receives judgment of death whereby he becomes attainted.

If the defendant, after conviction, remain without either receiving judgment or praying his clergy, he may be indicted for any other offence or even for the same (*y*).

But if the defendant, on being called to judgment, *pray, his clergy*, the conviction is pleadable though he be not actually admitted to it (*z*).

(*s*) 2 Haw. c. 35. s. 3.  
Summ. 246. Keil. 58.

(*t*) 26 Ass. 15. 2 Hale, 242.

(*u*) Rast. Ent. 385. 2 Hale,  
243.

(*x*) 2 Hale, 251. 4 Co. 394.  
2 Leon. 83.

(*y*) 4 Co. 45. Vaux's case.  
Holcroft's case, 4 Co. 40.

Kel. 103. 2 Hale, 251.

(*z*) 2 Leon. 160. 1 And.  
68. 4 Co. 45, 46. 3 Ins. 161.

Salk. 63. 2 Hale, 250. 390.

It was formerly doubted whether a prisoner could plead his previous conviction where he had never been called upon for judgment (a). But it has been perfectly settled that he may, provided he pray his clergy, for otherwise he would be prejudiced by the delay of the court without any fault of his own, and if he could be precluded from pleading his conviction by the omission of court to call him to judgment, it would render this high privilege in favour of life precarious and discretionary. Not to say that a demand of clergy by a convict before he is called to judgment is in strictness as legal and operative as a demand after a call to judgment; and a right to clergy, and an obligation to allow that right, are reciprocal and correlative terms (b).

And, therefore, if the party pray his clergy, and the court will advise upon it though clergy be not actually allowed, he may plead the conviction (c).

Formerly a conviction of one offence *followed by the allowance of clergy* (d), was a bar to an indictment for any former felony, for the stat. 25 E. 3. c. 5. directs, that the clerk shall be arraigned of all his offences together, and then be delivered to the ordinary. Hence, by a delivery to the ordinary, the prisoner was holden to be virtually discharged from all former offences, whether clergyable or otherwise.

This defect was partially remedied by the stat. 8 Eliz. c. 4. which enacts, that the admission to clergy shall be no bar to an indictment for an offence previously committed whereupon clergy is not allowable.

(a) 1 Sid. 316. Kel. 106. (c) 2 Hale, 251.

Dyer, 214. 2 Haw. c. 36. s. 14. (d) But otherwise if clergy

(b) *Armstrong v. Lisle*, had not been allowed. F. Cor. Skinn. 670. Kel. 93. 103. Salk. 394, 361. Staundf. 108. 2 Haw. 62. 2 Haw. c. 36. s. 14. See c. 36. s. 16.

*Searle's case*, Hale, 289.

By the stat. 18 Eliz. c. 7. s. 2. burning in the hand is wholly substituted in place of delivery to the ordinary; and every person admitted to his clergy shall answer such felonies or offences as he should have done if he had been delivered to the ordinary, and made his purgation. And, therefore, clergy discharges of all precedent offences which are within clergy, but not of such offences as are not within the benefit of clergy (*u*).

It has already been seen, that the stat. 3 H. 7. c. 1. takes away the plea of *auter-foits acquit* or *auter-foits attain* upon an appeal of death; but if a man, upon an indictment of murder, be found guilty of manslaughter, his conviction is pleadable to an appeal (*x*), for he is neither acquitted nor attainted; and for the same reason it seems, that a verdict finding a man guilty of homicide, *se defendenda*, would also be pleadable, as at common law, to a subsequent appeal (*y*). And, upon the same ground it has been doubted, whether a conviction of murder upon an indictment is not a bar to an appeal (*z*).

*Of the plea of auter-foits attain.*

After an attainder, the party is, to many legal purposes, considered as actually dead, and to have forfeited, all that he can forfeit; and, therefore, it would be superfluous to try him again (*a*). And even though the attainder is founded upon an insufficient indictment, yet as long as it subsists, it is valid and pleadable in bar (*b*). And it is immaterial, whether it was founded upon an indictment or an outlawry (*c*).

But this plea is never allowed to prevail, where a se-

(*u*) 2 Haw. c. 36. s. 11.

(*z*) See 2 Haw. c. 36. s. 17.

(*x*) 2 Haw. c. 36. s. 12. 4 Co. 46. Semble not.

2 Hale, 250. 4 Co. 45.

(*a*) 2 Hale, 250. 4 Bl. Comm.

(*y*) 2 Haw. c. 36. s. 17. 1 336. 6 H. 4. 6.

Ins. 55. 4 Co. 45.

(*b*) 4 Co. 45. 2 Hale, 251.

(*c*) 2 Hale, 252, 253.

cond trial would answer any useful purpose (c); and, therefore, for the benefit of the king, or for the purpose of giving a private individual restitution of his property, an indictment is maintainable after an attainder: for example, a person, adjudged to suffer death for felony, may be indicted for treason committed either before (d) or after (e) the felony, to entitle the king to the escheat. So if A. commit a felony on the goods of B. and afterwards upon the goods of C. after an attainder upon the prosecution of B. he may be put to answer either an appeal or an indictment at the suit of C.; in order that the latter may have the benefit of restitution under the statute (f). But C. may have an inquest of office to inquire of the robbery, so as to entitle him to restitution without arraigning the party on the indictment (g).

And *a fortiori* for the sake of public justice, an attainted felon may be arraigned upon an indictment for another offence, in which he is a principal, for the purpose of convicting the accessories (h).

The plea is valid only so long as the attainder remains in force; if, therefore, A. commit several felonies, and be attainted of one, and the king pardon that attainder and felony, he cannot be again indicted of the same felony, but he may be indicted of any other (i). So if a person attainted, after his attainder commit a felony, and the first be pardoned, he must answer an indictment for the latter (k).

(c) Staundf. 107. 4 Bl. Comm. 337.

(d) 1 H. 6. 5. Staundf. c. 37. f. 109.

(e) 1 Ins. 213.

(f) 21 H. 8. c. 11. Staundf. l. 3. c. 10.

(g) 2 Hale, 252.

(h) Popham, 107.

(i) 2 Hale, 253. 6 H. 4. 6. Coron. 227. 1 Ins. 213. contra,

(k) 6 H. 4. 6.

An attainder reversed for error cannot be pleaded, for a reversed attainder is no more to be considered than if it had never existed (*l*). The observations made upon the plea of *auter-foils acquit* are most of them applicable also to the pleas of *auter-foils convict* and *auter-foils attaint*. The record must be pleaded, must be produced, or vouched; averments of identity are requisite, upon which issue may be taken, which issue must be tried by the jury that is returned to try the prisoner, and he must plead over, not guilty to the principal charge (*m*).

If A. commit several felonies, and be attainted and pardoned of one, and to an indictment for another plead the attainder, the subsequent pardon may be replied (*n*).

*Plea of pardon.*

A pardon, when available to the prisoner, ought to be taken advantage of by means of a special plea, or upon a motion in arrest of judgment; for the corruption of blood, occasioned by an attainder, can be restored, by act of parliament only; but if the pardon be allowed in any stage before attainder, the corruption is prevented (*o*).

If the pardon be by letters patent under the great seal, they should be set out in the plea, and the defendant should make a profert of them (*p*).

The plea concludes thus: "*Quarum quidem literarum domini regis (ac dicti brevis*, if there be a writ of allowance) *prætextu, prædictus J. H. petit, quod ipse de præmissis per curiam hic dimittatur, &c.;*" and then the entry is, "*super quo visis et per curiam hic intellectis omnibus et singulis præmissis consideratum est, quòd prædictus J. H.*

(*l*) 4 Bl. Comm. 336.

(*o*) 4 Bl. Comm. 337.

(*m*) 2 Hale, 255.

(*p*) See Hambden's case,

(*n*) 2 Hale, 253.

Trem. 312.

*eat inde sine die;*" and in the margin of the roll this entry is commonly made, "*literæ patentes allocantur sine die, &c.*"

A prisoner pleading a pardon does not plead over to the felony, because the two pleas would be inconsistent. But if the pardon be deemed insufficient, he shall not be convicted, but *in favorem vitæ* shall plead over to the felony (q), and may plead the pardon even after conviction (r).

Where the guilt of the defendant depends upon the guilt or innocence of another, in relation to whom the offence is committed, he may plead the acquittal of that person in bar of the indictment against himself. Thus an accessory may plead an acquittal of the principal. So a gaoler, indicted for wilfully permitting a prisoner for felony to escape, or one indicted for the rescue of a felon, may plead the acquittal of that felon (s).

So if A. steal the goods of B. and break out of prison, he may be arraigned for the felony of breaking out of prison before an arraignment upon the principal felony. But if he be acquitted of the principal felony before he be arraigned of the breaking out of prison, he may plead the acquittal (t).

It is a general rule, that no *justification* can be pleaded to an indictment for treason or felony (u); for the fact is laid *proditorie* in the one case and *felonice* in the other,

(q) *Ruttaby's case*, 2 Hale, 37 H. 8. B. Appeal, 122. but 256. it was holden by Needham, J.

(r) *R. v. Arundell*, Trem. 37 H. 6. 20. & 21. that, upon 271. an indictment of murder, the

(s) 2 Hale, 254. defendant might plead, that in

(t) *Mrs. Samford's case*, 2 Hale, 255. an appeal before the constable

(u) 2 Hale, 304. 26 H. 8. 5. and marshal of treason, the ap-  
pellee killed the appellant.

and these allegations must be answered directly; besides, under the general issue, the party will be at liberty to give any special defence in evidence, though the matter of fact be proved against him; and, therefore, it seems the law will not allow him to limit his means of defence by a special plea.

The defendant, upon an indictment or information for a misdemeanor, may, it seems, plead any special matter which is, in law, a bar to the proceeding against him. Thus, if he fall within any exception or proviso which is not contained in the purview of the statute, he may, by pleading, shew that he is entitled to the benefit of that exception or proviso (x).

But if the defendant plead special matter in justification or excuse, he cannot also plead the *general issue* (y); yet he may plead the general issue as to part, and specially as to the residue (z). And though in a capital case an arraignment upon an indictment will be no bar to a second, to an information, *qui tam*, the pendency of a former suit may be pleaded in abatement (a). But if the first information be fraudulent it will be no bar to a second, and fraud may be replied (b). In Tremaine's Pleas of the Crown there is a plea of *son assault demesne* to an indictment of assault and battery; but Lord Holt was of opinion, that such a plea could not be pleaded, and that the special matter ought to be given in evidence under the general issue (c).

It is a well known rule of law, that whatever the prosecutor is bound to prove under the general issue, the

(x) R. v. Baxter, Leach, 660. (b) Vin. Ab. Inf. 415. Noy.

(y) 2 Haw. c. 26. s. 62. 4 118.

Com. Dig. Inf. Str. 1044. 4 (c) Trem. 270. Holt, 172.  
T. R. 701. but see the pleadings, Trem.

(z) 2 Haw. c. 26. s. 62. 273. R. v. Lovelace.

(a) 2 Haw. c. 26. s. 63.



defendant may disprove by opposite evidence (*d*). So that whenever any person is charged with the repair of an highway against common right, he may be discharged upon the plea of not guilty. But if the indictment charge the inhabitants of a parish with not repairing an highway within the parish, since they are *prima facie* liable by the law of the land to repair that highway, they must set forth their discharge by means of a special plea (*e*), shewing who is liable to the duty of repairing. So the inhabitants of a county, if indicted for the non-repair of a bridge, or of the highway within 300 feet of the extremity of the bridge, must, to exonerate themselves, plead specially, that some other is bound by prescription or tenure to repair the same (*f*). Where different districts within a parish have been used to repair their respective highways, and the parish at large is indicted, the prescription ought to be pleaded, for if judgment should be given against the parish after verdict on not guilty pleaded, or by default, the judgment would be evidence of the liability of the whole parish to repair (*g*), though not conclusive evidence, if it could be shewn that the inhabitants of the district bound to repair the road had been guilty of any fraud, or if the districts exempted by prescription could shew that the defence was conducted without their privity or knowledge (*h*).

The proper form of pleading such a prescription seems to be this, each district claiming an exemption should

(*d*) 1 Str. 181. R. v. Inhab. of Norwich. (*f*) 7 East, 588. 12 East, 192.

(*e*) 1 Vent. 189. 1 Ld. Ray. 725. 2 T. R. 111. 1 Mod. 112. R. v. St. Andrews, 1. (*g*) Peake's Ni. Pri. 219. R. v. St. Pancras, 2 Sauud. 159. n. 10.

(*h*) 2 Sauud. 159. n. 10. Doug. 421.

state, in a separate plea to the indictment, "that the parish has been immemorially divided into a certain number of districts or townships called A., B., C., &c. and that the inhabitants respectively of the several districts, A. and C. (in which the highway lies), have been immemorially used and accustomed to repair and amend the several and respective highways, situate and lying in their said respective districts independent of each other; and that the said part of the said highway in the said indictment mentioned, lies in that part of the said parish called the district C. and by reason of the premises the inhabitants of the said district ought to have repaired the same independent of the inhabitants of the said district of A. in the said parish (i)".

In charging an individual with the obligation to repair an highway, in an indictment or plea, in respect of his tenure of certain lands, it seems to be sufficient to allege, that he was bound *ratione tenuræ terræ*, without adding *sua*, for though it has been objected that *sua* ought to be added in order to shew an occupation by the defendant, the occupier, and not the owner being liable, the court held that *ratione tenuræ* implied such a tenure as made him chargeable (k).

Where the obligation arises from *tenure*, it is not necessary, either in an indictment or plea, to allege any title or prescription, because a prescription is implied in the estate of inheritance in the land (l); but where the obliga-

(i) 2 Will. Saund. 159. n. 10. (l) See the observations of Serjeant Williams, 2 Saund.

(k) 1 Str. 187. 1 Vent. 331. 158. n. 9. Co. Ent. 358. a. 2 Will. Saund. 158. and Ib. n. Keil. 52. pl. 4. 1 Haw. c. 76. 9.; but see 1 Haw. c. 76. s. 90. s. 8. Styles, 400. 5 H. 7. 3. pl. 8.

tion arises from *inhabitancy*, a prescription must be alleged (*m*). And in conformity with this distinction, between an obligation to repair by reason of tenure and of inhabitancy, it has been holden, that an indictment against a particular part only of a parish for not repairing a highway in the parish, stating that the inhabitants of the district, from time immemorial, ought to repair and amend it, is insufficient; it ought to state, that the inhabitants of such district, from time whereof, &c. have used and been accustomed, and of right ought, to repair and amend it, for the inhabitants of a particular division of a parish are not bound to repair by common law, and therefore the indictment should shew the reason of their obligation (*n*).

But *an individual* cannot be bound by prescription, unless in respect of his tenure of land, taking of toll, or other profit; for the act of the ancestor cannot charge the heir without profit, though a corporation, or a parish, or part of it, may be charged by prescription to do so (*o*).

As a county may plead that an individual is bound to the repair of a bridge, so if that individual has been indicted and fined by the judgment of the court, the county may plead the conviction, setting forth the record and averring the identity of the bridge, &c. (*p*).

#### VI: *Plea—General issue.*

By the general plea, that he is not guilty of the treason or felony alleged against him, the defendant denies the

(*m*) 1 Haw. c. 76. s. 8.

(*n*) 5 Burr. 2700. 3 Keb. 501. 3 Bac. Ab. 58. 2 T. R. 111.

(*o*) 13 Co. 33. 1 Haw. c. 76. s. 8. 3 Bac. Ab. 58.

(*p*) Trem. P. C. 206. Ray.

384.; in a case of this kind it does not appear to be necessary that the defendants should be prepared with the record *en poigne*, as in case of a plea to an indictment for felony. See the precedent, *postea*.

whole of the charge, and he may give his special defence in evidence though the matter of fact be proved against him. And upon the defendant's giving special matter of excuse or justification in evidence, the jury are as much bound to take notice of it as if it had been specially submitted to their consideration by a special plea (q).

The defendant may have the benefit of this plea, in capital cases, after any special plea has been overruled (r), or even after a demurrer (s).

It has been said, that by pleading the general issue the defendant waives the benefit of a pardon under the great seal (t). But this position does not appear to be correct. In Arundel's case, the defendant pleaded the king's pardon after a conviction of homicide, and Sir Edward Coke, then attorney-general, replied to the plea (u).

And, in general, the pleading not guilty is no waiver of a special plea, and does not render it double (x).

But if A. having the king's pardon of manslaughter, be arraigned upon an indictment for murder, he ought not to plead not guilty, for he would thereby waive his pardon. He ought to confess the indictment as to the manslaughter and plead the king's pardon, and as to the killing with malice prepense he shall plead that he is not guilty. Then, if he were to be found guilty of murder, he would have judgment, if acquitted of the murder his plea would be allowed (y).

(q) 2 Hale, 258.

(r) 2 Hale, 257.

(s) 2 Hale, 257. contra.

(t) 2 Haw. c. 37. s. 59.

(u) Trem. 273. 6 Co. 14.

(x) 22 E. 4. 29. 2 Hale, 256.

(y) So ruled by Lord Hale in Sir Thomas Pettus's case,

24 C. 2. 2 Hale, 258. in conformity with the st. 13 R. 2. c. 1. which expressly requires that before any pardon shall be allowed, it shall be inquired by the county, whether the killing were of malice prepense, and if so the pardon shall be disallowed.

The plea to an indictment for felony consists of two parts; 1. The issue of *not guilty*, whereupon the clerk joins issue by the words *cul. prist.* 2. The putting himself upon the country, when the clerk demands how he will be tried.

And if either of these fail, the prisoner stands mute, whereupon he was formerly, in case of felony, put to his penance; but now, in case of both treason and felony (x), judgment is given and he becomes attainted (y).

Upon a criminal information or indictment for a misdemeanor, if the defendant do not plead, judgment is given as upon a conviction (z). Upon the plea of not guilty, issue is joined for the king, by the words, A. B. *qui pro rege sequitur similiter, &c.*

And it seems that there is no necessity for any addition to shew that A. B. is the proper officer for this purpose, for it is to be intended that he was known to be such by the court (a). And in appeals of felony, whether by an appellant or an approver, issue is in general expressly joined by the appellant or approver (b).

It has already been seen, that where defendants are charged with the omission of a duty to the performance of which they are *primâ facie* bound by the law of the land, they cannot discharge themselves under the general issue, but must set forth the grounds of their discharge by a special plea. But in all other cases the defendant is entitled to the benefit of his defence upon evidence under the general issue, and, therefore, a special plea is seldom resorted to (c).

(x) By stat. 12 G. 3. c. 20.

(y) 2 Hale, 258.

(z) 4 Bl. Comm. 525.

(a) 2 Haw. c. 38. s. 2.

(b) Rastal, 42. 2 Haw. c. 38. s. 3.

(c) If after conviction the

defendant pray the benefit of the statute, the prosecutor should file a counter plea; for the form of this; and likewise of special replications in particular cases, see the PRECEDENTS.

## CHAP. XX.

*Of the Verdict.*

- I. *General Verdict*, p. 324.
- II. *Partial Acquittal*, p. 328.
- III. *Special Verdict finding the Facts*, p. 333.

UPON a capital charge, a verdict cannot be given in the absence (a) of the defendant, and should be returned openly (b) in court; and the jury, just before they give their verdict, are required by the clerk of the arraigns to look upon the prisoner (c). But in case of a misdemeanor below the degree of felony, if the prisoner has appeared and pleaded, the prosecutor may proceed to trial, and a verdict may be given against him in his absence. According to ancient custom, and even according to the practice of criminal courts for a considerable space of time after the revolution, it was holden, that a jury sworn and charged in a capital case, could not be discharged until they had given a verdict, a rule calculated to give an offender one more chance of escaping, in case of the accidental inability or perverse default of a juror.

(a) 2 Hale, 298.

(c) Ray. 193.

(b) 2 Haw. c. 47. s. 2. 1 Ins.

§27. 3 Ins. 110.

Where the offence turns out in evidence to be of an higher degree than is alleged in the indictment, it is in the discretion of the court to discharge the jury and to direct another indictment to be preferred. Thus, where the indictment charges the prisoner with murder, and the offence appears to be petit treason, it would not be adviseable to direct the jury to acquit, least the defendant should avail himself of the acquittal in bar of a second indictment; and in such case the most prudent course would be to discharge the jury upon that indictment, and to direct a fresh one to be preferred (*d*). So if upon an indictment or action for a trespass the offence appear to be felony, no verdict ought to be taken unless the defendant has been acquitted of the felony (*e*).

The jury may either deliver a general verdict of conviction or acquittal upon the whole of the charge against one or more defendants; or, *secondly*, they may specially find the defendant guilty of part of the charge and acquit him of the remainder; and where several are indicted together, may find one or more guilty of the whole or part, and acquit the rest; or, *thirdly*, they may find the special facts upon which the charge is founded.

I. If they find the prisoner *generally, guilty*, judgment may be given against him, provided any one count in the indictment be sufficient to support the charge, though the rest of the indictment be faulty; for being guilty generally, he is severally guilty of each offence separately charged, and, therefore, is found guilty upon that charge which is sufficient to warrant the judgment (*f*).

(*d*) Fost. 327. 328. 104. su- 2 Roll. Ab. 556, 7. 1 Mod. pra, p. 38. 289.

(*e*) R. v. Cross, 12 Mod. (*f*) Salk. 384. 730. Str. 520. 634. 2 Haw. c. 47. s. 6 845. Cowp. 276.

Hence the case differs from that of a general verdict in a civil action, where general damages are given and where one of the counts is faulty; for since damages are given generally, some part must have been given in respect of the faulty counts, and the court cannot apportion the damages and say how much the plaintiff ought to receive upon the sufficient counts (g).

Secondly, the jury may find the defendant guilty of part of the charge and acquit him of the residue.

For, in the first place, every indictment is divisible in respect of its several counts, each of which professes to charge a distinct offence of which it contains a complete description; and, therefore, a defendant may be found guilty of the charge contained in any one count, and acquitted as to the remainder.

So in general where, from the evidence, it appears that the defendant has not been guilty to the extent of the charge specified in the indictment or information, he may be found guilty as far as the evidence warrants, and be acquitted, as to the residue (h); as where he is charged with engrossing 1000 quarters of wheat, and the evidence amounts to but 700.

But if the defendant be charged with making a contract contrary to the purview of a statute, such contract must be proved as laid (i).

The same principle applies where the description of the offence laid in any count of an indictment, includes that of a more general and less aggravated offence; then, except in some special instances which will be noticed,

(g) 1 T. R. 151. 3 T. R.

483.

(i) 2 Haw. c. 26. s. 75.

Lane, 19. 59, 60.

(h) 2 Haw. c. 26. s. 75.



the defendant may be found guilty of the more general and be acquitted of the more aggravated offence. Thus it has been holden, that upon an indictment for burglary the defendant may be found guilty of the larciny and acquitted of the burglarious entry (*k*); upon an indictment for stealing privately from the person, he may be found guilty of the larciny and be acquitted of the residue of the charge (*l*); upon an indictment under the statute of stabbing (*m*), he may be acquitted of the offence charged under the statute, and may be convicted of manslaughter at common law (*n*); upon an indictment for murder he may be found guilty of manslaughter (*o*); upon an indictment for petit treason he may be convicted of murder or any inferior species of homicide (*p*); upon an indictment for grand larciny he may be found guilty of petit larciny (*q*).

It is said to have been adjudged, that where the jury find a man not guilty upon an indictment or appeal of murder, they are not bound to make any inquiry whether he be guilty of manslaughter (*r*); yet, since a general acquittal upon an indictment of murder would bar a subsequent indictment of manslaughter, it seems to be the bounden duty of a jury to inquire of the manslaughter in the first instance; for otherwise the offence would go

(*k*) 1 Hale, 560. *R. v. Symmers*, Trin. 1706. *R. v. Francis*, Com. 478. *R. v. Wital and Overend*, Leach, 102.

2 Hale, 302.

(*l*) 2 Hale, 302.

(*m*) 1 J. 1. c. 8.

(*n*) *Harwood's case*, Style,

86, 2 Hale, 302.

(*o*) 1 Ins. 282. 2 Hale, 302.

(*p*) 2 Hale, 302. *Radbourn's case*, Leach, 512. 2 Haw. c. 47, s. 6.

(*q*) 2 Hale, 302.

(*r*) 2 Haw. c. 47. s. 4. *Cro. Eliz*, 276. 296. 464.

unpunished, and it is the constant practice, where the facts warrant it, for the court to charge them so to inquire.

Withal and Overend (t) were indicted for burglariously breaking and entering the dwelling-house of A. B. and stealing therein 60*l*. The verdict was, "not guilty of the breaking and entering of the dwelling-house in the night-time, but guilty of stealing the money in the dwelling-house." There was no separate count on the stat. 12 Ann. c. 7. for stealing in a dwelling-house to the amount of 40*s*. But a great majority of the judges were of opinion, that where a prisoner is indicted for a complicated offence, comprehending in itself divers circumstances of aggravation, each of which is ousted of clergy, though he be acquitted of some of those circumstances, yet if he be found guilty of others from which benefit of clergy is taken away, he shall receive sentence of death; and, finally, all the judges were of this opinion.

*Exceptions.*

In general, where the defendant upon his trial for the more aggravated offence would be debarred of any advantage which he might have claimed had he been tried for the more general offence, he ought not to be convicted of the latter, for he would thereby be excluded from those advantages to which he is by law entitled. And, therefore, if the defendant be indicted for felony, and upon the evidence it appear that the fact amounts to no more than a bare trespass, he cannot be found guilty of the trespass,

If the jury find facts specially felonious. Mackally's case, 9 Co. 69. Holloway's case, Palm. 548: must be given though they (t) Leach, 102. East. P. C. 547.  
act was malicious or the stroke

but ought to be indicted anew (*u*). It has been said, that if the offence be laid as felony, and the defendant be found guilty generally, if the court be afterwards of opinion that the fact amounts not to felony, but only to an enormous trespass, judgment may be given upon it as for a trespass only (*x*); but this doctrine was overruled in *Westbeer's* case, as being repugnant to the rules of law and the principles of justice (*y*).

But where a defendant is indicted for petit treason he may be found guilty of murder, for he loses no advantage by the change, but on the contrary, is placed in a better situation than if he had been indicted for murder. But for this very reason, if he be indicted for murder (*z*), and the offence turns out to be petit treason, though the latter be but aggravated murder, he ought not to be found guilty of the murder.

*II. General qualities and requisites of a verdict in case of a partial acquittal.*

It has been adjudged that the verdict, in case of a partial acquittal, should extend to the whole of the charge, so as to leave no part upon which the defendant has not been either convicted or acquitted. Hence, upon an indictment for murder, a verdict, finding the defendant guilty of manslaughter; but silent as to the residue of the charge, has been holden to be insufficient and void (*a*). But it is laid down generally, by many authorities, that upon an indictment for murder the prisoner may be convicted of manslaughter, without any intima-

(*u*) 2 Haw. c. 47. s. 6. Kel. (y) Leach, 15. Vide supra, 29, 30. R. v. Cross, 12 Mod. 520. 39,

(*x*) 2 Haw. c. 47. s. 6. Kel. (z) See p. 38. n. (*x*).  
29, 30. Cro. Car. 332. Cro. J, (a) And. 103, 2 Haw. c. 47.  
497. And. 351. Dalt. 321, s. 5,

tion that the charge of murder must be expressly negatived (a).

At all events, if there be any words from which it can be implied that the verdict extends to the whole charge, it will be sufficient. Therefore, where upon an information for forging and *publishing* a deed, the defendant was found guilty of the trespass and forgery *aforesaid*, the verdict was holden to be sufficient, though it expressed nothing as to the publishing, since the word *trespass* implied it.

And where several offences are charged in the indictment, and upon a general plea of not guilty the jury find the facts specially, and leave the question of guilt or innocence for the opinion of the court upon those facts, the verdict will be sufficient, though from those facts it appears that the defendant was guilty of one only of the offences charged. Thus, in Hayes's case (b), the indictment charged the defendant, 1st. with forging a bond; 2dly. with uttering the same, knowing, &c.; 3dly. with publishing a forged bond, (which was set out and was similar in its terms to the first) knowing, &c. The verdict found that the defendants did forge a bond, setting it out as in the first part of the indictment, and then specially found the publication of the same by the defendants, with a guilty knowledge; but whether, upon the whole matter, the defendants, or either of them, are or is guilty of the trespass, contempt, false forging, and misdemeanor *aforesaid*, in the indictment *aforesaid* specified, in manner and form as by the said indictment is supposed, the jury are ignorant and pray the advice of the court, and if the court &c. shall be of opinion, &c.; it was argued that the ver-

(a) 2 Hale, 302. 9 Co. 67. (b) Ld. Ray. 1518. Str. 843.  
4 Co. 40. 46.

dict was incomplete, since three offences were charged, but that the facts applied to the two first only, and that as to the last, the jury ought to have found the defendants not guilty. The court held, that if a jury find but part of the matter put in issue, and say nothing as to the rest, the verdict is ill, and a *venire facias de novo* shall issue if no judgment be given, and if judgment has been given it shall be arrested. But that, in the principal case, as the "not guilty" went to the whole indictment, so the verdict was found as to all the offences charged in the indictment. The jury had found all the facts proved before them, and submitted it to the court whether they did maintain all the charges. They might doubt, though the proof was but of forging one bond and the publication of that bond, whether they could, upon their oaths, safely say, that he was not guilty of publishing a certain forged writing, &c. knowing it to be forged, it not being alleged that it was another forged writing different from the first. But the court held, that though the indictment in mentioning a certain forged writing, did not say a certain other forged writing, yet that it was not to be taken as the same with the one mentioned before; and, therefore, that the proof was not applicable to the last charge, and, upon the whole, declared that the special verdict had found the defendants guilty as to the two first offences, and not guilty as to the last.

Where the prisoner is found guilty of the less aggravated offence, and acquitted of the more serious part of the charge, the more correct mode is, to find the prisoner guilty of the offence which has been proved, but not guilty of the circumstance in which the aggravation consists; for a verdict finding the defendant not guilty of the higher offence generally, but guilty of the inferior and included offence, has been objected to as contradictory, since an acquittal of the former includes an acquittal of the lat-

ter. In'Connor's (*b*) case, upon an indictment for burglary and stealing goods in the house, the verdict was "*guilty of felony in stealing goods to the value of 150*l.* from the dwelling-house, and not guilty of the burglary.*" According to one report of this case, it was holden, that an acquittal of the burglary included an acquittal of the breaking and entering and taking of the goods; but that, if the entry of the verdict had been "*not guilty of breaking and entering the house in the night-time, but guilty of the rest of the indictment, the prisoner would have been convicted of stealing goods to the value of 40*s.* in the dwelling-house, and been ousted of clergy by stat. 12 Ann. c. 7.* But from another report of this case, coming from high authority (*c*), it appears that *Ld. C. J. Lee, Parker, C. B. and the judges Reynolds, Abney, Burnet, Denison, and Clarke*, thought that the prisoner was ousted on the finding of the jury. *Willes, C. J.* inclined that the indictment was ill, *Wright, J.* contra. But upon the doubt expressed by the minority, the prisoner was recommended for a pardon on condition of transportation. In a subsequent case the prisoner was indicted for a burglarious entry and stealing in the house; the verdict was, "*not guilty of the burglary, but guilty of stealing to the amount of 40*s.* in the dwelling-house (d).*" And the entry was made by the officer in those words. The judges, upon consideration, held this to be sufficient to warrant a capital judgment. They agreed that the minute was only for the future direction of the officer, and to shew that the jury found the prisoner guilty of the larceny only. But many of the judges said, that when it occurred to them they should direct the verdict to be entered, "*not guilty of the break-*

(*b*) *Leach*, 43. entitled *Cormer's case*.

(*d*) *Hungerford's case*, *Bristol*, 1790. *East*, P. C. 518.

(*c*) *East*. P. C. 517. cites from a note of *Mr. J. Abney's*.

ing and entering in the night, but guilty of the stealing," &c." as that was more distinct and correct. It appeared to be the constant practice, upon every circuit in England, upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict, "not guilty of murder, but guilty of feloniously killing and slaying," and yet murder includes the killing.

It has already been seen, that though several may be jointly charged in respect of the same offence, yet that the law considers the crime of each as several, and that one or more may be convicted on the same indictment and the rest acquitted (*a*). And, therefore, if two be jointly indicted for murder, he who struck may be found guilty of manslaughter, he who maliciously abetted, of murder. So upon a joint indictment of petit treason, a wife or servant may be found guilty of petit treason, and a stranger of murder.

If the offence be in its nature such as to require the concurrence of more than one, the jury cannot acquit one or more, and find another guilty, where the guilt of that person, as alleged in the indictment, is inconsistent with the innocence of the rest. Thus if several be indicted for a riot or conspiracy, and the verdict acquit all but two in the former case, and all but one in the latter, it will be repugnant and void, unless the indictment allege the offence to have been committed in conjunction with other persons (*b*); for there can be no riot without three, or conspiracy without two.

So if an accessory, either before or after the fact, be indicted at the same time with his principal, if the latter

(*a*) *Vide supra*, 35. 2 Haw. Tr. 160. Popham, 202. Str. c. 47. s. 8. 193. 1227. 12 Mod. 262. Bur-

(*b*) 2 Haw. c. 47. s. 8. 4 St. row, 1262.

be acquitted, the accessory must also be acquitted as a matter of course, since his guilt is entirely inconsistent with the innocence of him who is charged as principal.

In the case of *Turner (c)* and others, who were jointly charged with a burglary, the jury found one guilty of the burglary and another of larceny only; but the two chief justices held, that the jury could not, upon the same indictment and the same evidence, find one guilty of the burglary and the other of larceny.

### III. *Special verdict.*

It is perfectly clear, that the province of a jury is confined to facts, and though a general verdict, which they are in all cases entitled to return, necessarily includes matter of law as well as of fact, yet upon the matter of law, they are in conscience bound in a doubtful case to follow the advice and direction of the court. And a general verdict, though founded upon a mistake in law, can seldom prejudice the defendant; for, since the special facts are stated upon the indictment, the mistake of the jury, in supposing that those facts in point of law constitute the offence, is open to the subsequent correction of the court. But the criminality of the party frequently depends upon circumstances, which *do not appear upon the record*; and this happens where a general verdict involves the application of legal and technical terms to facts of a doubtful nature. Thus in case of larceny what amounts to a *felonious* taking, and in case of homicide what amounts to a *felonious* killing of *malice prepense*, is to be collected from circumstances extrinsic of the record, and these frequently so far from being mere conclusions of fact, constitute very difficult and important questions of law. There are two modes of remedy; either the jury find the defendant guilty, and a spe-



cial case is reserved for the opinion of all the judges, and afterwards a pardon is applied for, if that opinion be in favour of the prisoner; or, according to the more formal and technical mode, the jury find the facts by a special verdict, which is entered upon the record, upon which the judgment of the court is afterwards pronounced.

For it has long been settled, that a jury may give a special verdict in a criminal case whether capital or not capital, as in a civil one (*d*). There is also one class of cases, in which a special verdict must necessarily be given: and this happens, where upon an indictment for murder or manslaughter, it appears to the jury, that the killing was by misadventure or in self-defence, for in such case it is not sufficient to find that the killing was by misadventure or in self-defence, but the special matter must be set forth (*e*); and then, if upon setting forth the facts, it appear to the court, that the killing amounted to murder or manslaughter, the court will give judgment accordingly, though the jury find in conclusion, that it was *per infortunium* or *se defendendo* (*f*).

The reason why a jury cannot acquit generally under such circumstances is, that though the facts do not amount to felony, yet they occasion a forfeiture of goods; and since the distinction between a killing by misadventure, or in self-defence and manslaughter, is often very nice and critical, and involves a question of law, it is proper that the whole should be submitted to the judgment of the court (*g*).

But if one of non-sane memory kill another, or if a

(*d*) 2 Haw. c. 47. s. 3. 2      (*f*) 2 Hale, 302. 2 Haw.  
Hale, 302. 9 Co. 12. 63. 1 c. 47. s. 4.

Buls. 87.

(*g*) 2 Hale, 302.

(*e*) 2 Hale, 302.

person lawfully kill another who attempts to rob him, the defendant may be found not guilty generally, for in such cases there is neither felony nor forfeiture (*h*).

The special verdict or case ought to state facts and not merely the evidence of those facts (*i*). When a fact is alleged to have happened at some place within the county merely by way of venue, the jury may find the thing done in any other place or county, provided it be of a *transitory nature* (*k*).

So a special verdict will be good, notwithstanding any other *variance* immaterial to the essence of the offence; as if an indictment for homicide allege three wounds to have been inflicted by the defendant, and the special verdict find one only (*l*). But the jury cannot find that which is essential to the offence to have happened in another county (*m*). Neither can they vary either from the time or place laid, when it is material to the offence (*n*). It is sufficient, if the verdict substantially find such facts as amount in law to the offence charged, though the precise and technical words of the indictment are not made use of. The indictment charged the defendant with *forging and counterfeiting* a bank note, the verdict

(*h*) 2 Hale, 303. See 24 H. 8. c. 5. Cro. Car. 544. Lord Hale excepts the case, where the coroner's inquest finds it murder or manslaughter; for there it is apparent, that a man has been slain, and the jury, if they acquit the prisoner, must inquire who did it; and to find the prisoner not

guilty, and yet find that he killed the deceased, would involve a contradiction.

(*i*) 2 Wils. 263.

(*k*) 6 Co. 47. 2 Roll. 689.

(*l*) Buls. 87. 2 Haw. c. 47. s. 4.

(*m*) 6 Co. 47.

(*n*) See Com. Dig. Pleader, s. 15.

found that he *erased and altered* a bank note by changing the word two into five, and was holden to be sufficient (o).

If the verdict do not sufficiently ascertain the facts of the case, the court may award a *venire facias de novo* (p); and it has been said, that a special verdict in a capital case cannot be amended (q). But Lord Mansfield held, that a special verdict might be amended, if there were minutes to amend it by (r), and this was done in Gibson's case (s). It is necessary that the verdict should expressly find the material facts to have been done in the county in which the indictment is laid, for otherwise the court cannot give judgment (t).

In deciding upon a special verdict, the attention of the court is confined to the facts expressly found, and a defect cannot be supplied by intendment (u). And, therefore, where the special verdict found that the prisoner discharged a gun, and thereby killed J. S. and did not find that he discharged the gun *against* J. S. as alleged in the indictment, the court held that they could not imply that circumstance from the facts of the case (x).

So where the defendants were indicted for a robbery from the person, and the special verdict stated facts which, in point of law, amounted to a larciny, but not to a larciny from the person, and referred it to the

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| (o) R. v. Dawson, Str. 19.   | (t) Hazell's case, Leach,   |
| (p) Skinn. 667. Ld. Ray. 1521.   | 406.; but there were other objections in this case, and the decision of the court was not made known. |
| (q) Per Lord Holt, Ld. Ray. 141.   |   |
| (r) Hazell's case, Leach, 425. Buller, J. contra. So if the defendant occasion the defect. Str. 844. | (u) 2 Haw. c. 47. s. 9.   |
| (s) See Doug. 375.   | (x) 2 Haw. c. 47. s. 9. Kel. 72. 111. 4 Burr. 2073. Str. 1015. Cowp. 830.                             |

court whether the prisoners were guilty of the felony and robbery charged against them in the indictment, the judges thought that judgment of larciny could not be given upon that finding (a). So where upon an information under the statute of usury, the jury found that as to the corrupt agreement in the said information specified, the defendant was guilty, and that he took profits, &c. to the value of 60*l.*; the verdict was holden to be imperfect, for the court could not take the lending of the money by intendment (b).

In the case of libel, it was for many years a disputed point, whether the jury had any other duty to perform than to find the fact of publication and the truth of the *innuendo's*; for it was said, that since the libel itself appeared upon the record, its intrinsic illegality and the intention of the publisher were matters of law to be decided by the court, upon consideration of the record itself. Woodfall (c) was indicted for publishing a seditious libel called *Junius*, the verdict was, "guilty of publishing *only*." It was contended that no judgment against the defendant could be founded upon this verdict, since the jury had not found *malice*. Lord Mansfield, in delivering the judgment of the court, intimated that where the act is in itself unlawful, the proof of justification lies upon the defendant, and in failure thereof the law implies a criminal intent. But, that since a doubt had arisen from the introduction of the unusual and ambiguous word *only* into the verdict, there should be a *venire de novo*. Shipley (d), dean of St. Asaph, was tried upon a similar indictment. The jury brought in their verdict guilty of pub-

(a) *R. v. Francis and others*,  
Rep. Temp. Hardwicke, 115.  
East. P. C. 784. tam. qu.

(b) Cro. J. 210.

(c) Burr. 2661.

(d) 3 T. R. 430.

lishing *only*, but upon being informed that by such a verdict they would negative the truth of the innuendos, and that if they left out the word *only* the question of law would be open upon the record, the jury found him "guilty of publishing, but whether a libel or not we do not find!" And upon a motion for a new trial, the court of King's Bench, in conformity with many previous decisions (c), discharged the rule.

But by the stat. 32 G. 3. c. 60. it is *declared* and enacted, that on every trial of an indictment or information for the making or publishing of any libel, it shall be competent to the jury to give a general verdict of guilty or not guilty upon the whole matter put in issue, and that the jury shall not be required or directed by the court to find the defendant guilty merely on proof of the publication by such defendant of the paper charged to be a libel, and of the sense ascribed to it in such indictment or information.

But where a jury find a matter committed to their charge, and afterwards conclude against law, the verdict will be good, and the conclusion may be rejected (d); as where, upon a charge of murder, the jury specially find the facts, and conclude that it was done *se defendendo* or *per infortunium*; if, upon the whole, it appear to be murder or manslaughter, the court will give judgment accordingly, notwithstanding such conclusion (e).

In case of an indictment for murder, it is not necessary that the special verdict should find *malice*, for malice is

(c) See 3 T. R. 430. in the notes, and Starkie's Law of Libel, 623. 5 Barr. 2661. 2686.

(d) 4 Co. 42.

(e) 2 Hale, 302.

always a conclusion of law from the facts (*f*); neither is it necessary to find that the stroke was felonious (*g*).

It was formerly not unfrequent, when the jury returned a verdict of acquittal manifestly against the evidence, for the court to direct them to reconsider their verdict before it was recorded; but this in modern times has seldom been practised (*h*).

If the jurors, by mistake or partiality, deliver an improper verdict in court, they may rectify it before it is recorded; or, by the advice of the court, may reconsider and alter it (*i*). But after the verdict has been recorded it cannot be altered in substance (*k*), though it seems that it is afterwards amendable in matters of form. A verdict of *acquittal* upon an indictment or information cannot be set aside and a new trial awarded (*l*).

But in case of a conviction, it is in the discretion of the court to grant a new trial where the verdict is against the evidence, or the directions of the judge, or in any case where it appears to be necessary for the purposes of justice (*m*). Where the facts are found so defectively that no judgment can be given, the court may award a *venire facias de novo*; but if the verdict has been entered contrary to the minutes taken at the trial, it may be amended by them (*n*).

(*f*) Str. 773. 12 Rep. 87. (*k*) 2 Hale, 300. 1 Ins. 227. Palm. 545. Ld. Ray. 1485. 20 Ass. 12. 5 H. 7. 22.

(*g*) Mackalley's case, 9 Co. (l) 2 Haw. c. 47. s. 12. 69. Holloway's case, Palm. (m) 2 Haw. c. 47. s. 12. See 545. p. 341.

(*h*) 2 Haw. c. 47. s. 11. (n) Hazell's case, Leach, And. 104. Crompt. 114. Al. 406. Cro. Eliz. 112, 150. 1 12. 2 St. Tr. 260. Sal. 47. 53.

(*i*) 2 Hale, 299. Plow. Com. 211.

*Of the finding of facts dehors the record.*

If a man be arraigned upon an inquest of murder or manslaughter returned by the coroner, and he be found not guilty, the jury who tried him ought further to inquire who committed the fact, and if they find that A. B. did it, he may be put upon his trial in chief upon that finding (*o*). And the practice was anciently the same with respect to indictments found by the grand inquest (*p*). But the usage had entirely ceased as to indictments, in the time of Lord Hale, and with respect to inquests had become mere matter of form (*q*).

And as to indictments of robbery, it was formerly the practice to oblige the jury under the statute of Winchester, in case they acquitted the prisoner, to present who did it, for the hundred was answerable, and the trials before the justices in eyre were for the most part by a petit jury of the same hundred; but afterwards, when the jury who tried and inquired came from the body of the county, the practice ceased (*r*).

The jurors of the petit inquest are charged to inquire if the party fled, and of his goods and chattels; this, however is but an inquest of office and traversable (*s*); but it has been said that a presentment of flight before the coroner, is conclusive (*t*).

It seems to be a general rule, that if a verdict contain such a finding as will warrant a judgment against the defendant, any superfluous and unnecessary addition may be rejected as surplusage (*u*).

(*o*) 2 Hale, 300.(*p*) *Ib*.(*q*) 2 Hale, 301.(*r*) 3 E. 3. Coron. 307.

Staundf. P. C. 181. 2 Hale, 301.

(*s*) 1 Hale, 362.(*t*) 1 Hale, 362. 2 Hale, 301.(*u*) 2 Haw. c. 47. s. 10.

## CHAP. XXI.

*Of Judgment.*

THE prisoner cannot be convicted of treason or felony unless he be present in court, but he may be found guilty of a misdemeanor in his absence; and, if he do not surrender himself to await the sentence of the law, a *capias* is awarded and issued to bring him before the court to receive his judgment; but if he be present at the trial, it is in course that he should be committed, unless the prosecutor consent to his being liberated upon his recognizance to appear when called upon to receive the sentence of the court (a). So if he be taken on a *capias pro fine*.

In case of felony there can be no *new trial* (b), but after a conviction of an inferior offence (c), the Court of King's Bench will, in its discretion, grant a new trial, whenever it is manifestly conducive to the ends of justice. In strictness the defendant should apply within the limits allowed in civil cases (d); but for the attainment of substantial justice, the court will interpose after the regular time has elapsed (e); and where some defendants have been acquitted and others convicted, the

(a) Burr. 2539. R. v. Waddington, 1 East, 159.; but the length of his previous imprisonment is taken into consideration by the court in their judgment.

(b) 6 T. R. 638.

(c) Ib. Doug. 797.

(d) 5 T. R. 436.

(e) R. v. Gough, Doug. 171. 797. 5 T. R. 436. 1 East, 146. 2 Str. 845.



court will, in its discretion, grant a new trial as to the latter, but they must all be present in court, when the motion is made (a).

By the practice of the court of King's Bench upon a conviction of any crime, whether capital or otherwise, the defendant is allowed four days to move in arrest of judgment (b), if there be so many remaining of the term, and if not, then the longest time that can be had (c).

In case of misdemeanors, if there be not four days remaining of the term, it seems that the court will not give judgment until the ensuing term (d). The defendant may move in arrest at any time before judgment has actually been given (e).

Upon a conviction at the assizes or quarter sessions, it is not unusual to pass sentence immediately, and in all cases of murder, in whatever court the conviction may be, it is expressly enacted by the stat. 25 G. 2. c. 37. that sentence shall be passed *immediately*.

If a man be indicted of felony before justices of the peace, oyer and terminer, or gaol delivery, and after conviction the record be removed by *certiorari* into the King's Bench, and the prisoner be also removed thither by *habeas corpus*, he may plead that he is not the same person, and allege a diversity of name, and if the king's attorney confess this, he shall be discharged out of cus-

(a) R. v. Mawbey et al. 5 T. R. 619. R. v. Teale et al. 11 East, 307.

(b) 2 Haw. c. 48. s. 1. 3 St. Tr. 794. Algernon Sidney's case, 3 St. Tr. 999. Boswell's case, 4 St. Tr. 777.

(c) 2 Haw. c. 48. s. 1. 4 St. Tr. 217.

(d) 7 St. Tr. 63; but see 4 St. Tr. 217. and 2 Haw. c. 48. s. 1. In one instance of an aggravated misdemeanor, Lord Hale is said to have refused to listen to a motion in arrest of judgment. Saund. 301, 2.

(e) 5 T. R. 445.

today (*f*). But the king's attorney may take issue upon it, and aver that he is the same person, and known by one name as well as the other (*g*). But if, upon being called upon to say why judgment should not be given against him, he stand mute, it is necessary to inquire whether he be the same person, for he is not concluded by the return if he has not continued in custody of the same court since his arraignment (*h*). And this is also necessary where a party is outlawed, and is brought into the King's Bench by *capias utlagatum* (*i*). But if he has been in the custody of the King's Bench from the time of his arraignment, or has been bailed by the court, and has been rendered by his bail, no such inquiry is necessary on his standing mute (*k*).

It seems to be a general rule, that no fault, which would have been fatal on demurrer, can be cured by the verdict; and, consequently, that any such fault may be taken advantage of by motion in arrest of judgment, or by writ of error if it be granted.

*Of the different kinds of judgment.*

The judgment in high treason, except in respect of the coin, is, that the offender be drawn upon a hurdle to the place of execution, there to be hanged by the neck, to be cut down whilst he is alive, and his entrails to be taken out and burnt before his face, and his head cut off and his body quartered, and his head and quarters to be at the king's disposal (*l*).

But the drawing upon a hurdle is not entered upon the

(*f*) John Apere's case, 2 Hale, 402.

(*i*) 2 Hale, 402.

(*g*) Brown's case, Lib. pl. Cor. 31. 2 Hale, 402.

(*k*) 2 Hale, 402. 10 E. 4. 19.

(*l*) East. P.C. 137. 2 Hale, 397. 1 Hale, 187.

(*h*) 10 E. 4. 19.

record (*m*); neither is the cutting off the privy members, which is not usually pronounced (*n*).

The judgment against a woman, whether for high or petit treason, was, that she should be burnt; but by the stat. 30 G. 2. c. 48. s. 1. she shall be drawn and hanged. Also by the second section of that statute, women convicted as principals or as accessories before the fact in petit treason, shall be dealt with according to the provisions of the stat. 25 G. 2. c. 37. in case of murder.

In all cases of *treason relating to the coin*, and of petit treason, the judgment is, to be drawn and hanged, which was the judgment previous to the stat. 25 E. 3. st. 5. s. 2. (*n*).

And though it has been holden that one guilty of a new created treason was liable to the severer sentence, yet the contrary seems to be settled, both because the other was the common law judgment, and also because it was to be presumed that the legislature, in creating a new treason relating to the coin, intended to constitute it with incidents similar to those belonging to other treasons concerning the coin (*o*).

The judgment for *felony*, whether against a man or woman, has been the same since the reign of Henry the first; to be hanged by the neck till he or she be dead: it is thus laconically entered upon the roll: "*Sus. per coll.*"

By the stat. 25 G. 2. c. 37. which was made for the purpose of adding a further terror and peculiar mark of infamy to the punishment for murder, it is directed that,

(*m*) 2 Hale, 397. 2 Haw. c. Bl. Comm. 92. Walcott's case, 48. s. 3. 4 Mod. 395.

(*n*) East. P. C. 137. 2 Hale, (*n*) 2 Hale, 397.  
397. 2 Haw. c. 48. s. 3. 6 St. (*o*) 2 Haw. c. 48. s. 4. 2 Tr. 16. and see Fost. 336. 4 Hale, 397.

" sentence shall be pronounced in open court immediately after the conviction of such murderer, and before the court proceed to any other business, unless the court see cause for postponing the same, in which sentence shall be expressed not only the usual judgment of death, but also the time for the execution thereof, and the marks of infamy hereby directed."

By the 1st. section, the execution shall be on the day next but one after sentence passed, unless it happen to be Sunday, and in that case on the Monday following.

By the 2nd section, "if the execution be in Middlesex or in the city of London, or within the liberties thereof, the body of the murderer shall be taken by the sheriff, &c, to the hall of the surgeons' company, or to such place as the company shall appoint, who shall give to the sheriff a receipt for the same, and the body so delivered shall be anatomized by the surgeons or by such persons as they shall appoint. If the execution take place at the assizes, the body to be delivered to such surgeon as the judge shall direct."

By sec. 4. the judge has power to stay the execution at his discretion, regard being had to the intent of the act.

By sec. 5. the judge may direct the body to be hung in chains.

The usual form of the sentence under this act is, " that you be taken from hence to the place from whence you came, and that you be taken from thence, on ——— next, to the place of execution, and that you be there hanged by the neck till your body be dead, and that your body, when dead, be taken down and be dissected and anatomized (p)."

Upon this act it has been holden that the judgment for

(p) See East. P. C. 373. and the case of Swan and Jefferies, Fost. 107.

dissection and anatomizing only, should be included in the sentence, and that, if it should be thought advisable, the judge might afterwards direct the body to be hung in chains by special order to the sheriff (*q*). That the statute extends to peers convicted before the lords in parliament (*r*). And that it applies to cases where the offence, from the relation of the parties, amounts to petit treason.

The judgment in case of *præmunire* is, that the defendant shall be out of the king's protection, and that his lands and tenements, goods and chattels, shall be forfeited to the king, and that his body shall remain in prison during the king's pleasure (*s*).

The judgment in case of *misprision of treason* is, that the offender shall be imprisoned during his life, forfeit all his goods and the profits of his lands during his life (*t*).

Judgment in petit larciny, at common law, is to be whipt and imprisoned for a limited time (*u*); but by virtue of several statutes, the offender may be imprisoned or transported for a term not exceeding seven years (*x*).

For crimes below the degree of felony, and for which no specific punishment is appointed by any statute, the judgment rests for the most part upon the discretion of the court. For crimes of an infamous nature, such as perjury, forgery, at common law, cheats, conspiracies, not requiring *villenous judgment* (*y*) and other such like, it is left to the wisdom of the court to inflict such corporal

(*q*) Fost. 107.

(*x*) 5 Ann. c. 6. 4 G. 1. c. 11.

(*r*) Earl Ferrers's case, Fost. 139. 10 St. Tr. 478.

6 G. 1. c. 23.

(*s*) 2 Haw. c. 48. s. 9.

(*y*) This severe judgment

(*t*) 1 Hale, 374. 2 Hale,

lies upon a conspiracy to indict an innocent man of felony, but

400. 3 Ins. 36. 2 Haw. c. 48.

seems now by long disuse to have become obsolete. See 4

s. 10.

(*u*) 2 Hale, 400.

Bl. Comm. 136.

punishment and fine as shall seem proportionate to the offence (z).

But the court cannot inflict any new mode or species of punishment before unknown to our laws, unless specially authorised by the legislature (a). And the court may assess a fine, but cannot award corporal punishment against an offender in his absence (b). Where several are jointly indicted, an award of a joint fine against them would be erroneous; for if the fines were not to be severally awarded, but one joint fine imposed upon all, one who had paid his proportionate share might be detained in prison for default of the rest, which would be in effect to punish him for the offence of another (c).

Upon a conviction for a *nuisance*, the judgment is to be adapted to the nature of the offence alleged, if there be no allegation of the continuance up to the time of taking the inquisition, judgment that it be abated is unnecessary (d); but if a continuance be alleged, *prostration* should be awarded (e); but the Court of King's Bench will not give such judgment, if they be satisfied that the nuisance has been already effectually abated (f).

During the term, assizes, or session, in which judgment is given, it remains in the breast of the court, and the fine imposed, or any other discretionary punishment may be varied; but after the term it becomes matter of record, and admits of no alteration (g).

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|-------------------------------|------------------------------|
| (z) See 2 Haw. c. 48. s. 14.  | (e) R. v. Pappineau, Str.    |
| (a) 1 Ins. 135. 2 Ins. 470.   | 686. 7 T. R. 468. 8 T. R.    |
| 201. 2 Haw. c. 48. s. 16.     | 142.                         |
| (b) Salk. 56. 400. Skin. 684. | (f) R. v. Incledon, 13 East, |
| (c) 2 Haw. c. 48. s. 18.      | 164.                         |
| 11 Co. 43. 1 Lev. 126.        | (g) 1 Ins. 260. Cro. Car.    |
| (d) R. v. Stead, 1 T. R. 142. | 251. 2 Haw. c. 48. s. 20.    |
| 7 T. R. 467.                  |                              |

## CHAP. XXII.

*Of avoiding the Judgment—Writ of Error, &c.*I. *By Plea*, p. 348.II. *By Writ of Error*, p. 352.

**A** judgment may be reversed either by plea or by writ of error.

The plea is founded either on some defect apparent on the record, or upon some fact extrinsic of the record.

1. *By plea founded on a defect apparent on the record.*

A judgment of outlawry for treason or felony is, as has been seen, equivalent to a conviction of the offence, in other cases to a conviction of the contempt only; in not appearing.

In civil cases it seems that the defendant may, in the same term in which the exigent is returnable, reverse the outlawry upon plea or motion, by shewing any error in the process or indictment; but in criminal cases it appears, that the court of King's Bench will not reverse an outlawry for an intrinsic error, except upon writ of error(a).

(a) See 2 Haw. c. 50. s. 1. and the authorities there cited.

1 Ins. 259.

And such appears to have been the inclination of the court in the case of the *King v. Davis* (b).

But a conviction of felony, whereon the defendant has had his clergy, may, it has been holden, be discharged by exception to the indictment, since no writ of error lies upon the conviction, but only upon a judgment (c).

2dly. *By a plea founded on matter of fact extrinsic of the record.*

Upon all outlawries, except of treason or felony, the defendant may appear by his attorney, in order to reverse the outlawry according to the provisions of the stat. 4 & 5 W. & M. c. 18. s. 3.; but to reverse an outlawry of treason or felony the defendant must appear in person, and so he must upon an outlawry after conviction for a misdemeanor (d).

The defendant may plead, in avoiding the outlawry, that his name, or his addition, or his estate, degree, or mystery, is improperly described (e).

But upon a plea that his addition is mis-described, it seems to have been doubted whether he ought not to be put to his writ of error, since he allows that he is the same person (f). So he may plead that there is no such town as that whereof he is named (g).

That at the time of the writ purchased, and ever since, he has resided at a place different from that named in the writ (h); but in such case it seems that the outlawry shall be avoided against the person pleading only, and shall

(b) Burr. 638.

(f) Fitz. Utlag. 37. 38 H.

(c) Cro. Eliz. 489. See 11 Co. 39.

6. 1. B. Utlag. 32. 51.

(g) Fitz. Utlag. 23. 26. 22

(d) R. v. Wilkes, 4 Burr.

E. 4. 37. 2 Haw. c. 50. s. 10.

(e) 2 Haw. c. 50. s. 10.

(h) 2 Haw. c. 50. s. 10. But see F. Ut. 5.



stand in force against the person of the same name and addition in the record (*i*).

If there be two persons of the same name and addition with those mentioned in the indictment and process of outlawry, and one be taken on a *capias utlagatum*, or appear in order to avoid it, he cannot do it by an averment that there are two persons of that name and addition, and that the person intended is the elder and that he himself is the younger, but must resort to his writ *de idemptitate nominis* (*k*), which lies when a man is taken or molested by process against another of the same name (*l*). And this has been said, by some, to be the only remedy in such case after outlawry returned (*m*); but Lord Hale expressly holds, that if a person taken on a *capias utlagatum* deny that he is the person, if the king's attorney take issue upon it it shall be tried, but that if the prisoner say nothing it shall be tried by an inquest of office (*n*).

But a person cannot come in before outlawry pronounced, and plead that he is not the person, but must resort to his writ *de idemptitate nominis*. In civil proceedings it is usual, in such a case, to enter a more full description of the person intended, upon a new *exigent*, in order to shew the diversity; but in criminal process this cannot be done without a writ, since the description is of the finding of the jurors, and, therefore, cannot be altered without a further finding by a jury (*o*).

If the party be correctly described, no outlawry

(*i*) 2 Haw. c. 50. s. 10. But see F. Ut. 25.

(*k*) 2 Haw. c. 50. s. 10.

(*l*) F. N. B. 268.

(*m*) 2 Haw. c. 50. s. 10. cites F. Ut. 6.

(*n*) 2 Hale, 402.

(*o*) F. Idemp. Nom. 3. F. N. B. 268. B. Idemp. Nom. 2. 11. 9 H. 4. 3.

can be reversed upon a plea of fact, unless in case of treason or felony (*p*).

But, in favour of life, an outlawry of treason or felony may be avoided, upon a suggestion or plea of any fact which shews it to have been erroneous (*q*); as, that the defendant was in prison (*r*), or in the king's service, or beyond the sea, at the time the outlawry was pronounced (*s*). In cases of *treason*, an outlawry pronounced against a person out of the realm, is, by stat. 26 H. 8. c. 13. as valid as if he had been resident within the realm; but, by the stat. 5 & 6 E. 6. c. 11. if the party so outlawed yield himself within one year, next after the outlawry pronounced, to the chief justice of England, and offer to traverse the indictment or appeal, he shall be received so to do; and, upon being found not guilty, by the verdict of 12 men, shall be clearly acquitted and discharged of the outlawry. These statutes extend to treasons created by subsequent statutes (*t*).

Where the judgment has been given by persons without authority, it may be falsified upon plea, for it is utterly void; as where a commission authorizes a proceeding upon an indictment by twelve, and it is taken by eight only (*u*).

Where a person has bought land of another, who is afterwards found guilty of felony generally, he may falsify the record as to the *time* of committing the offence, because the time is not material upon evidence (*x*); but if

(*p*) 2 Haw. c. 50. s. 6.

s. 9. Fost. 46. Burr. 630.

(*q*) 2 Haw. c. 50. s. 6. 1 Ins. 269. 10 H. 4. 7.

Armstrong's case, 3 Mod. 47. 3 St. Tr. 895.

(*r*) F. Utl. 2. 2 Haw. c. 50: s. 6.

(*u*) 3 Ins. 231. Summ. 270.

(*x*) 1 Hale, 361. 2 Haw.

(*s*) Burr. 640.

c. 50. s. 2. 3 Ins. 231. Syer's

(*t*) 3 Ins. 32. 2 Haw. c. 50.

case, Bl. Comm. p. 391.

the vendor be attainted upon confession or abjuration, or by outlawry upon an indictment, the purchaser may, it is said, falsify the attainder in point of the offence itself (z).

*By writ of error.*

A writ of error to reverse a judgment lies from all inferior jurisdictions to the Court of King's Bench, from the King's Bench to the House of Lords; it also may be brought in the King's Bench to reverse an attainder before the lord high steward (a).

In cases of treason and felony, this writ ought to be granted wherever there is probable error; but it cannot issue without the fiat of the attorney-general, or an express warrant from the king (b), which is not a mere matter of course. But where the offence is of an inferior nature, and there is probable cause, this writ is grantable of right and not merely *ex gratiâ* (c).

This writ may be brought as well by the executor as by the heir of the party, to reverse an attainder of treason or felony, but not by any other person (d).

The most usual way of bringing a writ of error upon an indictment at the sessions or assizes is, to remove the record by *certiorari* into the Crown Office, and then to bring a writ of error *coram nobis*; but the indictment may be removed by writ of error in the first instance (e). But a *certiorari* is not proper after conviction and before

(z) 1 Hale, 361. 49 E.3. 11. of ten of the judges in the  
7 E. 4. 1. 3 Ins. 231. 2 Haw. Aylesbury case, 3d Ann. and  
c. 50. s. 2. see 4 Burr. 2550.

(a) 1 Sid. 208. 4 Bl. Comm. (d) 5 Co. 111. Cro. Eliz.  
391. 2 Haw. c. 50. s. 17. 225. 273. 558. Salk. 60, 61.

(b) 4 Burr. 2550. 2 Haw. Harg. Co. Lit. 18. n. 1. 2  
c. 50. s. 13. 1 Sid. 69. 1 Buls. Haw. c. 50. s. 11.

71.

(e) 6 Mod. 178.

(c) According to the opinion

judgment; because the justices, who tried the cause, are best able to apportion the fine (*g*).

Upon a writ of error brought, the course is to serve a rule in the office to assign error, and upon failure, to move for a peremptory rule, and upon default to nonsuit the plaintiff in error, and to award execution (*h*).

Where a defendant in a civil action brings a writ of error to remove a record, and neglects to remove the record, the court, where it remains, may award execution; but it is otherwise of *certiorari* to justices of the peace, for this operates as a *supersedeas* of execution after its return on account of the express words, "*ed quod rex non vult feloniam illam terminari alibi quam coram seipso* (*i*)."

The nature of the objections upon which this writ may be founded, have already been considered in treating of the several kinds of defects in the indictment, caption, and process, none of which, it seems, are cured by verdict.

It is to be regretted, that the courts, in listening to trivial errors, have so frequently sacrificed the great ends of justice to a mistaken and misplaced humanity, precarious in its application, since it extends without distinction to all degrees of guilt, and mischievous in its consequences (*k*). In case of outlawries, indeed, trivial objections have been listened to with greater reason, for they enable the party to enter into the merits of his case.

As no writ can be allowed without the fiat of the attorney-general or warrant from the king, granted upon probable cause shewn, it follows, that the applicant, before he can obtain the writ, must assign his errors (*l*).

If the party attainted of felony had lands, the attainder cannot be reversed without a *scire facias* against all the

(*g*) 1 Salk. 149.

(*h*) 6 Mod. 178. 1 Vent. 53.

(*i*) Dy. 245.

(*k*) See Lord Hale's observations, *supra*, p. 227.

(*l*) 2 Haw. c. 50. s. 12. 1 H. 7. 13. B. Error, 351.

terre-tenants mediate or immediate (*l*), except in the case of treason (*m*), or in case of felony, where it is suggested upon the roll, that the party had no lands, and the attorney-general confesses it (*n*).

Upon the reversal of the attainder of the principal, that of the accessory is *ipso facto* reversed (*o*).

The stat. 33 H. 8. c. 29. which enacts, that attainders of high treason, by force of the common or statute law, shall have the same effect with a parliamentary attainder, applies to lawful attainders only, and not to those which are erroneous or void; such, therefore, may be avoided as before.

After the reversal of an outlawry of treason or felony, the defendant must plead to the indictment as if he had come in upon the *capias* (*p*), or, if the outlawry be subsequent to conviction, he shall receive the sentence of the law. But when the judgment pronounced upon conviction is reversed or falsified, all the previous proceedings are absolutely set aside, and the party is remitted to the situation he was in before the charge was made as to both credit and estate (*q*). But he is still liable to a second prosecution for the same offence, for his life was never in jeopardy by the first (*q*). If the lands of the person attainted have been granted away, he may, upon the reversal of the attainder, resume his possession, without either suing a petition to the king, or a *scire facias* against the grantee (*r*).

(*l*) 2 Haw. c. 50. s. 12.

(*o*) 2 Haw. c. 29. s. 40.

(*m*) In Stafford's case, M. 12. Ann. a *sci. fa.* in case of treason was holden to be unnecessary, upon examination of all the precedents.

(*p*) 2 Haw. c. 50. s. 18. 3 Mod. 42. Burr.

(*q*) 2 Haw. c. 50. s. 19. 2 Bl. Comm. 393.

(*n*) Salk, 495., 3 Keb., 29.

(*r*) 2 Haw. c. 50. s. 20. And, 188.

END OF VOL. I.



